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Legislative Reapportionment

Prepared By:
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MONTANA CONSTITUTIONAL CONVENTION

1971-1972

LEGISLATIVE REAPPORTIONMENT

BY ELLIS WALDRON

CONSTITUTIONAL CONVENTION MEMORANDUM NO. 10

PREPARED BY

MONTANA CONSTITUTIONAL CONVENTION COMMISSION

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PREFACE

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention. This series of memorandums by the Commission is in fulfillment of that responsibility.

This memorandum on legislative reapportionment was written by Ellis Waldron, a professor of political science at the University of Montana and a Commission member. The Commission has authorized publication of the report as approved by the Research Subcommittee on Local Government consisting of Commission members Clyde L. Hawks, St. Xavier, chairman; Charles A. Bovey, Great Falls; Jack E. Brenner, Grant; Eugene H. Mahoney, Thompson Falls, and Professor Waldron, Missoula. The memorandum includes historical background and present trends concerning the question of constitutional treatment of legislative reapportionment.

This memorandum is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

This memorandum is a supplement to The Legislature, Constitutional Convention Study No. 12, prepared by the Montana Constitutional Convention Commission.

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LEGISLATIVE REAPPORTIONMENT

SUMMARY: REAPPORTIONMENT AGENCY AND STANDARDS

Apportionment of legislative representation is a perennial problem involving fundamental elements of representative government. The "Great Compromise" in the Philadelphia Convention of 1787 reconciled conflicting views about apportionment of representation in the national legislature and cleared the way for the delegates to write the constitution we now revere.

The Northwest Ordinance of the same year required "proportionate representation of the people" in the legislatures of the Old West, and congressional legislation for the territories extended this requirement to the territorial government of Montana. For a quarter-century, both chambers of the Montana territorial legislative assembly were roughly apportioned to population. But a one-senator-per-county requirement was written into the Montana Constitution of 1889. Montana was apparently the first state since some of the original thirteen to base representation in one legislative chamber on counties, without regard to their population. Representation on this "little federal" analogy persisted in Montana and was embraced in a few other states during the first half of the twentieth century. The result was growing disproportion between constituency population and representation in the legislature; disproportions that had been moderate in the 1890s became considerable by the mid-twentieth century. Malapportionment became considerable in the house of representatives as well, despite the contrary intent of the 1889 Constitution, because legislative policy gave each county one representative regardless of population.

In 1964, the United States Supreme Court required all houses of state legislatures to be apportioned to constituency populations, stating that any other mode of representation denied people equal protection of the laws guaranteed by the Fourteenth Amendment. Montana's 1889 constitutional provisions for the senate and long-standing statutory provisions for the house fell before judicial challenge in 1965; the disproportion of representation to population in both houses was so great and so apparent that the federal court simply took judicial notice of the "invidious discrimination" involved. It passed the ball back to the 1965 Legislature, which was unable to agree upon a reapportionment, and then finished the job after legislative adjournment. The 1967 Legislature adopted the judicial reapportionment as

statute law. Meanwhile, the 1965 Montana Legislature had proposed a constitutional amendment, ratified in 1966, that removed archaic and unconstitutional provisions relating to apportionment from the constitution.

By 1970 the general standard of population equality to be achieved among legislative districts, although not precisely defined by the federal courts, was understood to cast doubt upon variances of more than 10 percent among districts.

In the 1971 Montana Legislature, the senate and house reapportionment committees went through the regular session without agreement upon any reapportionment plan, and plans given serious consideration in both committees were either patently unconstitutional or open to grave constitutional questions. A plan finally adopted during the first special session broke no county boundaries but had population variances of 37 percent in the senate and 23 percent in the house between largest and smallest constituencies. A federal district court promptly declared the plan unconstitutional because of these variances and invited the legislature to try again. In a second special session, the legislature adopted a plan that split five counties, with maximum population variances of 10.95 percent between the largest and smallest districts.

This plan also was challenged in the federal court that retained jurisdiction from the first action; with election of delegates to the Constitutional Convention imminent, the court sustained the reapportionment for election of delegates to the Convention, and further considered its validity for legislative elections; ultimately the reapportionment was sustained for ensuing legislative elections, on the somewhat novel ground that the average population variance among districts was less than 3 percent. The court refused to adopt either of two other reapportionment plans that had total population variances of less than 4 percent on the ground that the legislature had made a good-faith effort to achieve equality while preserving as many county boundaries as possible, and that the maximum variances were "tolerable." The court said plaintiffs had failed to prove that the large multi-member district in Yellowstone County amounted to a political gerrymander.

Montana's experience with judicial agency to backstop the legislature in reapportionment has been more typical than exceptional, but less complicated than the experience of many states where both state and federal courts have sometimes been involved with successive sessions of the legislature.

This may have been avoided in Montana by the willingness of the federal court in 1965 to assume the task of reapportionment. But there is widespread sense that judicial reapportionment is not the most desirable pattern, and that there may be better ways to handle this perennial problem.

The judicial reapportionment of 1965 reversed a fundamental aspect of legislative representation in Montana. From 1889 to 1965, single-member districts had been the prevailing mode of representation except for small multi-member house districts in a few of the most populous counties. The federal court, in 1965, sacrificed this prevailing pattern in order to preserve county boundaries for districts; less than half of the counties were single-county districts. The 1967 Legislature, having managed election from the new-style districts, ratified the court's decision into statute. The 1971 Legislature sought without success to keep legislative districts within population variances of 10 percent without breaking county boundaries, but evidently still considered the integrity of county boundaries to be more important than the resulting pattern of multi-member representation. Single-member districting disappeared entirely from the house of representatives and only ten of fifty senators would be elected from single-member districts in the 1970s. Two of these single-member districts were single-county districts.

Most states still entrust the reapportionment function to the legislature, but some states have experimented for more than a century with a non-legislative reapportionment agency. Such experiments multiplied dramatically during the reapportionment revolution of the 1960s. The earlier experiments, like that of Ohio, made reapportionment an executive but essentially non-discretionary function--to carry out rigorous constitutional specifications for districting and apportionment. These arrangements did not function effectively when they functioned at all during the 1960s, in part because the constitutional standards to be applied were not compatible with "one-man, one-vote" equality of constituency populations.

Starting with Missouri in 1945, a growing number of states have developed specialized bipartisan reapportionment agencies either to backstop or to supplant the legislature as the reapportioning agency. By 1971, the constitutions of more than a third of the states had provided for some non-legislative reapportioning agency, either to backstop the legislature after its failure, or simply to perform the task instead of the legislature. The popularity of such arrangements has been particularly apparent among constitutions whose

legislative articles have been redrafted as part of general constitutional revision in recent years. Among more than a dozen such constitutional drafts since 1955, only two left the traditional legislative arrangement for reapportionment undisturbed.

The special bipartisan reapportionment commissions of Pennsylvania, Maryland and Hawaii, and those proposed for Maryland and New York, each varying in detail from the others, were developed in efforts to improve upon somewhat earlier models in Missouri, Michigan and New Jersey. All of them afford interesting grist for constitutional innovation, if it appears that the traditional legislative agency, now so commonly shared with the courts, has not been wholly satisfactory.

Among interesting recent innovations are the proposals of the 1968 Maryland draft constitution, adopted in a modified form by special constitutional amendment in 1970, that require a non-legislative agency to initiate reapportionment and submit its plan to the legislature; the legislature has a limited amount of time to revise or adopt the plan or to enact its own alternative; if the legislature fails to act by the deadline, the non-legislative reapportionment becomes law. Thus at the end of the legislative session which has a responsibility to reapportion, there is a reapportionment even if the legislature fails the task. In Maryland as in other states, any plan adopted by any reapportioning agency, whether legislative or non-legislative, is subject to judicial review for conformity to state constitutional standards and to the Fourteenth Amendment equal protection standard of the national Constitution.

It is too early to assess the relative success of legislatures and of special reapportionment agencies in the 1970s. A summary of 1971 reapportionments available at year's end reported that twenty-nine states had completed the task in some fashion but that judicial challenge had been made in sixteen states. Seven of the twenty-nine states had managed reapportionments with population variances of less than 1 percent. Judicial challenge of Montana's second 1971 legislative reapportionment had failed in a federal district court but the variances in the plan were marginally large and appeal to the United States Supreme Court was still under consideration in December 1971.

The rigorous constitutional standards for reapportionment in nineteenth century constitutions have proven to be unworkable by "one-man, one-vote" standards and they have been repealed, as in Montana, or remain in the state charter as deadwood awaiting the axe of general constitutional revision.

LEGISLATIVE REAPPORTIONMENT

The modern state constitutions commonly determine the size of the legislative chambers, either stating a fixed number of members, a range of size or a maximum to be observed by the apportioning agency. They commonly declare whether districts are to be single-member or multi-member or (at least by implication) a mixture of the two forms. They counsel the observance of compactness, contiguity and equality of population in the districts and, sometimes, observance of existing subdivision boundaries as district boundaries. Some qualify these standards by "as possible" or "as practicable" or "substantial" or "with due regard," but such qualifiers may add little to the force of the word modified, while furnishing additional ground for litigation over the discretion exercised by the reapportioning agency.

The reapportionment provisions of the Montana Constitution, as amended in 1966, seem compatible with contemporary imperatives of reapportionment. The provision [Art. VI, Sec. 2 (3)] that contemplates return to one-senator-per-county representation seems unlikely to be implemented even if it should sometime become permissible; it speaks as a voice from the nineteenth century, plaintive, probably archaic, but essentially harmless. The language of the provision for combination of counties [Art. VI, Sec. 3] may be open to interpretation that it permits combination only of whole counties, and conceivably could cause difficulty. The standards of contiguity and compactness in the same section seems unexceptionable.

The principal constitutional issues involving reapportionment are likely to be whether the constitution should develop a non-legislative agency to backstop or to supplant the legislature in the reapportionment function and whether the constitution, rather than the legislature, should determine the kinds of districts from which legislators are to be elected.

PREFACE: A WORD ABOUT TERMS

Late in the last century, from about the year 1960, Americans struggled for "equality of representation" by periodic or decennial redistricting and reapportionment of their legislative assemblies to what they called "one-man, one-vote" standards.

All of the key words used in that struggle had either four or five syllables. The only popular label developed by men-in-the-media to identify what was going on was itself a compound of four one-syllable words that were even less descriptive than the polysyllables used by the politicians, legalists and academics to communicate with each other.

A citizen in 1971 might have wondered whether these ponderous incantations were the mutterings of some priesthood conspiring to keep him bewildered. The simple truth, seen in the long evolution of language forms, was that the problem was new and that short-word symbols had not yet developed for matters not yet entirely understood.

--Thomas Aquarius, from Polls, Pols and Words (Mars: Multican & Lipschitz, 2071 A.D.)

Thus might a 21st-century historian of the language look back at our efforts to communicate about a fundamental aspect of our political system. The term "reapportionment" has come to identify two separable but related aspects of a periodic process for determining representation in representative assemblies. Strictly speaking, the term "districting" refers to the process that establishes the boundaries of election districts from which legislators are elected, while the term "apportionment" refers to the process that assigns the number of legislators to be elected from each district. Political decisions of a fundamental sort are involved, at some stage, in both processes, but the particular combinations of process determine how frequently, and at what points, these decisions must be made.

In the historic Montana state senate, both districting and apportionment were "automatic" or "self-executing:" each county received an apportionment of one and only one senator and no apportioning agency was required; this simply perpetuated a profoundly important political decision made in the Constitutional Convention of 1889.

Modern one-man, one-vote requirements have tended to require active decision-making about both districting and apportionment at each periodic reapportionment. With single-member districts, redefinition of district boundaries to create districts of approximately equal population becomes the focal point of political pressure, while apportionment of one seat to each district is "automatic"--the policy involved in the decision having been made earlier, perhaps by constitutional provision. With multi-member districts, both districting and apportionment may have recurring political implications. If districts may be redefined from time to time by new combinations or by subdivisions of counties, the political process is renewed with each such redefinition. If apportionment involves assignment of one or many legislative seats to each district, depending upon its population, political decision is involved with each periodic assignment. Thus in modern times, periodic political process has been involved in both districting and apportionment of both houses of the Montana Legislature.

TWO CENTURIES OF LEGISLATIVE REAPPORTIONMENT

In a system of representative government, decision about who will "represent" whom, or what, in the legislature has constitutional dimensions that were recognized in colonial charters and the earliest state constitutions of the 1770s. Modern state constitutions generally address the matter either in the legislative article or in a separate article such as Article VI of the 1889 Montana Constitution, titled "Apportionment and Representation."

Centuries-long recognition of the fundamental importance of decisions about representation does not mean that consensus has been reached about its implications. Political thought is far from agreement about what the essential act of representation in fact involves, quite apart from questions about what it should involve in any particular political system.[1] Divergent views about the nature and norms of representation are part of the debate about the nature of democracy itself. Pessimistic observers make lack of agreement a starting point for their criticism of democratic political systems; others more optimistically inclined suggest that lack of agreement about the nature and functions of representation is a symptom of growth and of expanding horizons of human experience and values.

In antiquity, rulers regarded themselves as representatives of those they ruled, even as modern dictators make essentially similar claims--that they rule because they know best what is good

for the rest. In medieval Europe, notions of group or corporative representation emerged, and in both England and on the continent, members of pre-modern parliaments were spokesmen of classes or estates--the nobility, the clergy and eventually the burgers or bourgeoisie from the commercial market towns. At first these spokesmen of their estates assented to taxation of wealth in the form of land and of commerce in exchange for having some say about what should be done with the money. Only gradually did parliaments gain law-making functions that are considered the essence of their modern function; this happened long after advisory judicial and fiscal functions had been divested to specialized judicial and administrative bodies.

In general during the medieval and early modern period, individuals had been regarded as aggregated for representation as members of a class or of a place; similar notions of class or occupational representation have persisted in modern Europe in the representation through corporations in Fascist Italy and in factory soviets (assemblies) in the Soviet Union. Vestiges of corporative or non-territorial representation persisted in the United Kingdom until 1948 in the election of certain members of the House of Commons from non-territorial university constituencies. The House of Lords had from the first comprised representatives of the nobility and clergy, selected without regard to a territorial place or district.[2]

As early as 1635, some attention was paid to population size of the assembly constituencies in Massachusetts Colony, and the Rhode Island charter recognized "comparative numbers" in the towns "almost from the start." But summarizing colonial experience with representation, Luce concludes:

> Nowhere did representation bear any uniform relation to the number of electors. Here and there the factor of size had been crudely recognized. It took the travail of the birth of a nation to make men think they had rights of men, as individual men, and that each was entitled to a share in government equal to that of his neighbor . . . . [This idea] came nearer than most political ideas to being an invention, a discovery.[3]

Yet there had been suggestions of such notions a century earlier in John Locke's tremendously influential Second Treatise of Civil Government (1690). In his discussion (Chapter XIII) of the legislative branch, Locke was troubled by the rotten borough phenomenon by which "the bare name of a town . . . where scarce so much housing as a sheepcote, or more inhabitants than a shepherd is to be found, send[s] as many representatives to the grand assembly of lawmakers as a whole county numerous in people and powerful in riches." But his legislature was "the

one supreme power" and correction of this deficiency presented practical problems.[4] There was apparently no notion that the sovereign legislature itself could be expected to rectify "the disorders which succession of time have insensibly as well as inevitably introduced" by rise of "new corporations, and therewith new representatives" while others "cease to have a right, and be[come] too inconsiderable for such a privilege, which before had it."[5]

Locke proposed a solution more akin to modern notions than much of the intervening historical experience. The executive, exercising prerogative power to implement the principle Salus populi suprema lex (the people's welfare is the highest law), should convoke the legislature according to "the numbers of members in all places, that have a right to be distinctly represented . . . in proportion to the assistance which it afford to the public . . . it being the interest as well as intention of the people to have a fair and equal representative . . . ." Such executive intervention would permit the people to "choose their representatives upon just and undeniably equal measures, suitable to the original frame of government." Such action "cannot be judged to have set up a new legislative, but to have restored the old and true one."[6] This seems to be a reasonable summary of notions spread across two lengthy pages of rather abstract and archaic prose, and the modern observer may be pardoned for a certain excitement in finding the essential elements of the modern reapportionment problem in a discourse three centuries old: a rigid structure of representation progressively distorted from original intent by the shifting of populations, unable to correct its own structural distortion; and an outside agency, the executive, intervening to restore the intended bases of representation. It will be noted below that the American states generally ignored Locke's notion, and vested responsibility for periodic rectification of the disorders wrought by time and movement of peoples in the legislature itself.

Certainly the notion that individuals might represent aggregations of other specific individuals found roots and took substance in the heightened sense of individuality that has characterized modern western society. The emergence of social contract notions of political authority in the seventeenth and eighteenth centuries, contemporary with American colonial experience, reflected the impact of this individualism; the political system came to be regarded as a matter of agreements among individuals about their needs for government and about their expectations of those who would be entrusted with political authority.

The fact that some of the colonial assemblies had based representation on the number of "ratable polls" (taxable persons) in territorial enclaves may have informed arguments of colonists

that taxation by Parliament could be justified only if the colonies had direct representation in that body. Luce suggests that Patrick Henry may have been the first to propose apportionment of representatives in strict ratio to population, during discussions in the 1774 Continental Congress. Pennsylvania first gave systematic implementation to the idea in the apportionment provision of its 1776 Constitution, to be implemented by a census in 1778 and every seven years thereafter. The early state constitutions of Massachusetts, New Hampshire and Maine also recognized population as a basis for apportioning legislative representation, and the idea was extended to the new states of the "old west" by requirement of the Northwest Ordinance of 1787 that "the inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the legislature."[7]

In England, representation closely apportioned to population came somewhat later. The English Reform Act of 1832 for the first time reorganized membership in the House of Commons to represent people within fixed and mutually exclusive territorial subdivisions of the United Kingdom.[8] There have been four major realignments of representation in the House of Commons since 1832, each more closely approaching the notion that each member, elected from a single-member district, should represent roughly comparable numbers of constituents. In the mid-nineteenth century, population disparities among single-member districts were of the magnitude of 110 to 1, or even 150 to 1. Such disparities have been reduced to the magnitude of two-to-one or three-to-one in the most recent redistricting activities.

It may be noted in passing that the task of redistricting the United Kingdom for parliamentary elections is performed by permanent boundary commissions functioning as administrative agencies to implement general standards defined by Parliament. The somewhat-depoliticized Speaker of the House of Commons serves on each of the boundary commissions; other members of Commons are barred from membership. Robert Dixon emphasizes that the English boundary commissions consider "local ties"--whatever these may mean--and that the narrow margins of population variance currently demanded in American reapportionment practice would seem peculiar in the United Kingdom. In short, the British have come far from the 150 to 1 population variance ratios of 1868, and have experimented in interesting fashion with periodic review by administrative agency. Yet a rigid "one man-one vote" policy of elevating mathematics above community would be contrary to deeply imbedded English conceptions of representation and to recent practice.[9]

LEGISLATIVE REAPPORTIONMENT

The eighteenth and nineteenth century American experience with districting and apportionment of state legislatures has not been definitively analyzed. The work of Robert Luce, dean of an earlier generation of legislative scholars, is anecdotal, not very systematic and seriously dated. Three widely cited modern discussions manage to convey divergent impressions of the earlier experience.

In December, 1962, at the threshold of the reapportionment revolution, the quasi-public Advisory Commission on Intergovernmental Relations issued a report, Apportionment of State Legislatures, that declared: "The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population." The influential nature of this finding is indicated by its citation in the 1964 Supreme Court reapportionment cases that required both houses of state legislatures to be apportioned closely to population.[10] Under this somewhat unexpected rule Montana's constitutional provisions for equal senate representation of counties without regard to their population soon were held to be unconstitutional under the equal protection requirements of the Fourteenth Amendment.[11]

The 1962 Advisory Commission report measured eighteenth- and nineteenth-century practice against the considerable population disparities that existed in most state legislatures in the 1960s, on the eve of the reapportionment revolution. It emphasized two points: that earlier state legislatures, whatever their formal constitutional provisions, represented population, however counted, more equitably than did many twentieth-century legislatures, and that organization of state legislatures on the "little federal analogy" so familiar to Montanans was exceptional, rather than common practice, among the states.

The 1962 ACIR report and the 1965 treatise of Robert McKay, dean of the New York University law school, Reapportionment: The Law and Politics of Equal Representation, stressed the influence of the requirement in the Northwest Ordinance of 1787, in holding nineteenth-century legislatures to apportionment on the basis of population. McKay stated: "Not until more than a hundred years after the ratification of the Constitution in 1789 did states such as California, Illinois, Michigan, New York, Ohio and Pennsylvania, responding to new pressures, abandon the equal-population principle in one or both houses."[12]

McKay identified the 1889 Montana Constitution as heralding a "new trend." Contrary to practice in its territorial legislature which represented population at least roughly in both chambers, and contrary to the selection of Convention delegates themselves in proportion to population, the 1889 Montana Constitutional Convention

> worked out a different formula, retaining population as the basis of representation in the lower house but allotting one senator to each of the sixteen counties in the upper house. The change was prompted by the rapid growth of population between 1880 and 1889, after the discovery of copper, and particularly the concentration of that population in three counties in the western part of the territory. As a result, the fear was expressed, as it was soon to be expressed in other parts of the country, that a concentrated majority of the voters was not to be trusted with legislative power.
>
> Thereafter, the same phenomenon recurred in a number of the already-established states . . . . Montana, then, was in 1889 the immediate harbinger of the future. Within seven years of the taking of the 1890 census Delaware and New York changed their state constitutions . . . . After the census of 1900 Ohio . . . guaranteed each of its 88 counties at least one representative without regard to population.[13]

An over-simple summary of twentieth-century experience with reapportionment would suggest that states whose constitutions required periodic reapportionment to population equality standards simply "ignored the state constitutional command for periodic reapportionment"[14] while legislatures in states like Montana, whose constitutional provisions served to deepen malapportionment with each succeeding decade, observed their constitutional obligations rather faithfully.[15]

The third and most comprehensive review of reapportionment experience, by Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (1968), reviewed the pre-1964 reapportionment experience against rigorous contemporary one-man, one-vote standards and emphasized that the earlier standards of population equality were considerably less demanding. But in general this study by a professor at the National Law Center, George Washington University, affirms the notion that there was a flight from population standards of the nineteenth century during the first half of the twentieth century. Dixon (at page 77) questions the detailed validity of the 1962 ACIR Report but scarcely dents its overall findings. McKay's characterization of nineteenth-century apportionments as dominated by "a population-apportionment principle" was "supported by part of the eager empirical data available [but] rebutted by other parts." Yet the main theme of the earlier studies is accepted. While none of the territorial legislatures created under the Northwest Ordinance would have met "one-man-one-vote standards of the mid-1960s . . . . none of the population disparities approached the ranges of the more deviant states on the

eve of Baker v. Carr; rather, they were more similar to the ranges which the Supreme Court held unconstitutional in 1964 for Colorado (upper house, 3.6 to 1; lower house, 1.7 to 1)."[16] Of Montana, Dixon states:

> Montana, for example, came into the Union in 1889 with guarantee of county equality in the senate. The provision was motivated mostly by fear that otherwise both houses would be controlled by three counties containing the copper and gold boom towns of Butte, Anaconda and Helena. By the eve of Baker v. Carr the policy of equal representation in the state senates of fixed geographic units, with insignificant modifications based on population, was part of the formal apportionment formula in seventeen states, of which ten were Western or Midwestern states.[17]

The record of legislative districting and reapportionment in Montana has been sketched elesewhere and will not be repeated in detail here.[18] The Reapportionment Revolution of the mid-1960s made much of this local record little more relevant for current consideration than the experience of other states.

Reflecting the pattern of the Northwest Ordinance noted earlier, Congress in 1867 required the bicameral territorial legislative assembly of Montana to reflect population of the counties that served as legislative districts to both chambers.[19] The draft Constitution of 1884 contemplated continuance of representation according to population in both chambers:

> Article IV, Section 4 (in part): It shall be the duty of the first Legislative Assembly to divide the State into Senatorial and Representative districts, but there shall be at least one Senator from each county . . . .
>
> Article IV, Section 46: The Legislative Assembly, at its first session held under this Constitution, shall provide by law for an enumeration of the inhabitants of the State, and as often thereafter as in the opinion of the Legislative Assembly such enumeration shall be necessary, and shall revise and adjust the apportionment for Senators and Representatives on the basis of such enumeration according to the ratio to be fixed by law.
>
> Article IV, Section 48: The Legislative Assembly shall not increase the Senate and House of Representatives to a number greater, in the aggregate, than one hundred, prior to the year, A.D. 1900, and in case of such increase, the ratio of Senators to Representatives

> provided for in Section Four [21-to-45] of this Article shall be preserved as nearly as practicable.

The 1889 Constitutional Convention departed from this historic pattern of representation based on population, and the departure provoked one of the major controversies of that convention. The 1889 congressional enabling act for the northwest states had omitted stipulations requiring representation apportioned to population, the provisions that had held representation in the Montana territorial legislature fairly close to the population norm of the Northwest Ordinance of 1787. Delegates from sparsely populated eastern agricultural counties evoked the "little federal analogy" to justify representation of counties equally in the senate, without regard to their population. As noted by both McKay and Dixon, they were determined to offset the entrenched political power of the older and more populous western mining centers; the matter was not unrelated, besides, to the rather spectacular rise of Republican Party strength during the previous decade. Western-county delegates attacked the validity of the "little federal analogy" with vigor but no success; Missoula County delegates joined eastern-county delegates to recommend that each county should be represented by one and only one senator. Parts of that decision were embedded in several provisions of the constitution and this fact in itself probably reflects the bitterness of the struggle over the bases of political power in the new state legislature.[20]

The Montana senate created in 1889 represented counties equally; each would have one and only one senator.[21] As new counties were carved out of existing counties during the next four decades, the original senate of sixteen members became a body of fifty-six. The population disparity among counties in the early 1890s was in the magnitude of about 11.5-to-1; by 1962 the disparity had increased to 88-to-1 between Yellowstone County and Petroleum County, each represented by one senator. Senators representing less than 17 percent of the state's population could have mustered a majority of votes in the 1963 legislature.

The Montana House of Representatives was to be reapportioned to population twice each decade, on the basis of census enumerations and "according to ratios to be fixed by law."[22] During the first two decades, disparities among populations represented by house members were held within the magnitude of about two-to-one. Representatives of at least 45 percent of the state population, however aggregated, would have been required to cast a majority vote in the house or representatives during these early decades.

In the original 1889 constitutional apportionment, population equality was achieved in part by creation of several joint or

"floterial" seats in which two counties shared a representative who was the sole representative of the less populous county. The 1895 legislative reapportionment terminated seats jointly held by two counties, and initiated the policy that eventually caused serious malapportionment to develop in the house of representatives; each county would receive at least one representative regardless of population. From time to time the total number of seats was readjusted by changing the apportionment ratio that fixed the number of seats for each county. The steady if unspectacular growth of the state's population, combined with the creation of new counties, increased the house from its original membership of 55 in 1890, to 72 in 1905, to 95 in 1915, to 108 in 1921. The apportionment ratio of one representative for each 4,800 population or major fraction, set in 1911, was changed to 1 per 6,000 in 1921; 1 per 7,000 in 1941, and 1 per 8,500 in 1961, evidently with the intent of keeping membership less than 100, the maximum comfortable seating capacity of the house chamber. House membership ranged from 100 to 102 between 1921 and 1941; 90 during the 1940s; and 94 from 1953 to 1965, when judicial reapportionment increased the size to 104. The 1971 reapportionment by which Constitutional Convention delegates were elected, set the size of the house at 100.

Malapportionment of the Montana house of representatives reached significant proportions only toward the end of the "county-busting era" after 1910. As the number of counties doubled between 1910 and 1925, some of them for the first time lacked sufficient population to entitle them to a first representative. The 1921 reapportionment set a ratio of one representative for each 6,000 population or major fraction (one more than half, or 3,001). For the first time, in 1921, several counties lacked the 3,001 population that would have entitled them to a first representative; they got one anyway, under continuance of the 1895 statutory policy that each county should have at least one representative regardless of population. In succeeding decades that policy progressively distorted representation of the house of representatives. The number of counties whose population was less than a major fraction of the apportionment ratio increased from four in 1920 to eight in 1930; to fourteen in 1940; to sixteen in 1950, and to nineteen in 1961. In the apportionment of 1961, upset by the federal court in 1965, representatives of only 36.6 percent of the state's population could have mustered a majority of votes in the house of representatives, and the disparity between smallest and largest representation ratios had grown from about 1-to-5.2 in 1930, to 1-to-14 in 1961. That is, the largest house constituency was fourteen times larger than the smallest constituency--one representative for the 675 persons found in Petroleum County by the 1961 census. In summary, a statutory policy set in 1895, only questionably constitutional

under terms of the 1889 Montana Constitution, had led the house of representatives to become grossly malapportioned to population by the eve of the reapportionment revolution. Both houses of Montana's legislative assembly were more malapportioned to population than several of those found by the U.S. Supreme Court in 1964 to be unconstitutional denials of equal protection of the laws guaranteed by the Fourteenth Amendment.[23]

When the Montana legislative assembly met in January, 1965, Montana was one of but seven states in which no judicial challenge to state legislative apportionments had been brought in the wake of the 1964 reapportionment cases. The governor invited the legislature to reapportion the house of representatives, to adjust the congressional districts and to propose a constitutional amendment that eventually would permit statutory reapportionment of the senate. The next day, Mrs. Phoebe Herweg of Butte asked the federal district court to declare both houses of the state legislature malapportioned in violation of Fourteenth Amendment guarantees of equal protection of the laws. The court took judicial notice of "invidious discrimination" in the election of members of both houses and invited the legislature to correct the matter. Nearly a dozen reapportionment bills were introduced, but none was acceptable to the legislators; their only effective response to the judicial challenge was proposal of a constitutional amendment that cleared the way for future statutory reapportionments to one-man, one-vote standards. The amendment, ratified in 1966, removed archaic apportionment and districting provisions of the original constitution, deleted the prohibition against subdivision of counties to permit establishment of single-member districts, removed constitutional provisions barring equitable apportionment of the senate and deleted an unworkable provision for filling legislative vacancies. The amendment also anticipated a time when constitutional interpretation or amendment would permit restoration of a senate based upon one senator per county.

The federal district court stepped back into the litigation after the legislature adjourned, and decreed one of the earliest direct judicial reapportionments of a state legislature. It created a senate of fifty-five members and a house of 104, creating districts of whole counties or combinations of whole counties, and substantially altered the historic basis of representation primarily from single-member districts. Where the senate had always been single-member, one per county, eleven of the more populous counties now elected from two to six senators each; 35 of the 55 senators now would be elected from multi-member districts. Where only 38 of the 94 representatives in the 1961 legislative reapportionment had been elected from multi-member districts, 93 of the 104 representatives now would be elected from multi-member districts. The

shift to multi-member representation resulted in part, of course, from assignment of more legislative seats to the most populous counties, but it was also the product of assigning two representatives to a single-senator district; this occurred in seventeen districts.[24]

Later in 1965, the federal court readjusted the boundary between the two congressional districts for the first time since its establishment in 1917, and required reapportionment of aldermanic districts in Butte to one-man, one-vote standards.[25] In 1967 the legislative assembly adopted the judicial apportionment without change,[26] and this plan remained in effect through the November, 1970 election.

In 1971 the legislature enacted a new apportionment in the first special session[27] that was held invalid by a federal court for population variances of as much as 37 percent between the largest and smallest constituencies.[28] A second reapportionment plan, also challenged in federal court, was sustained for election of the Constitutional Convention,[29] and later for subsequent legislative elections.[30] This 1971 reapportionment went even farther than the 1965-1967 reapportionment to employ multiple-county and multi-member districts. Only five single counties comprised entire districts: Cascade, Flathead, Lake, Silver Bow and Ravalli; all other counties were either combined as whole counties or had portions combined with other counties. Only ten senators among the 150 legislators would be elected from single-member districts. There were no single-member house districts because representation from the twenty-three districts was simply doubled for house representation. The distribution by number of legislators per district is shown in Table 1.

It is axiomatic that partisan interests are deeply involved in legislative reapportionment, and to the extent this is true, the remarkable record of party division in Montana during reapportionment years might suggest a particular difficulty for legislative address to the problem. In eight of ten reapportionment sessions following a federal census (1891 to 1971) or a judicial invitation to reapportion (1965), party control was divided between the legislative chambers (six times: 1891, 1911, 1941, 1961, 1965 and 1971) or between the governor and the legislature (twice: 1931 and 1951). Only in 1901 and 1921 did the same party control both legislative chambers and the governorship. Stated somewhat differently, in each of the last six sessions charged with a specific obligation to reapportion (1931 through 1971) the disposition of party forces was such that a gross partisan gerrymander working to the advantage of one party could have been blocked either by one chamber or by a veto.

But the partisan interest is neither simple to identify nor readily assessed, because each party has bases of strength in

TABLE 1

DISTRIBUTION OF LEGISLATORS PER DISTRICT IN MONTANA
1971 REAPPORTIONMENT

NUMBER OF MEMBERS	NUMBER OF DISTRICTS Senate	House
Single-member	10	--
2-member	6	10
3-member	4	--
4-member	1	6
6-member	2	4
8-member	--	1
12-member	--	2

Source: 1971 Laws of Montana, 2nd Extra Session, Ch. 8.

more than one region of the state, and among both city and rural constituencies depending upon the region. The record of party division might help explain the disinclination of legislators publicly to exacerbate the partisan considerations, but there may be other factors as well. Interparty coalitions of local partisan interest may be involved.

CONGRESSIONAL REAPPORTIONMENT

Apportionment provisions of the 1787 national Constitution borrowed from contemporary state constitutional practice. Article 1, Section 2, clause 3 contained an initial apportionment of house seats to each of the thirteen states in rough proportion to their presumed populations; guaranteed each state a first representative; required a census to be conducted decennially, and required that "representatives and direct taxes shall be apportioned among several states . . . according to their respective numbers" (but without express requirement that Congress reapportion after each census). [31]

The number of representatives in Congress originally was limited to not more than one for each 30,000 population--a size limitation that still prevails but which rapidly became meaningless with growth of the nation's population. After the 1790 census,

the House of Representatives increased from the original 65 members to 105--one member for each 33,000 population. Each decade Congress reapportioned, increasing the size of the House eventually to 435 after the 1910 census, when it was agreed that there should be no further increase. This meant that after the 1920 census, Congress faced the classic modern reapportionment dilemma: without increasing the size of the House, eleven states had to lose representation to allow eight others to gain the seats to which their 1920 population entitled them. So, for the first time, Congress failed to reapportion on schedule; the matter was finally resolved by 1929 legislation providing for what amounted to "automatic" reapportionment by executive action. After each census, the Bureau of the Census would compute the representation of each state by a formula for resolving fractional claims to seats (the method of "equal proportions" was chosen in 1941); the President then would report the results to Congress, which would relay them to the states. A contemporary observer has remarked of the process:

> With the apportionment function now largely the responsibility of executive authorities, Congress no longer is able to ignore the reapportionment obligation . . . . Congress itself recently has done no more than consider questions of expanding House size.[32]

Starting in 1842, Congress required election of representatives from single-member districts and from time to time has required other standards such as compactness, contiguity and equality of population; the actual districting function is left to the states, which have left it generally to their legislatures subject, since Wesberry v. Sanders[33] in 1964, to judicial review for observance of increasingly rigorous one-man, one-vote standards of population equality within each state.

THE REAPPORTIONING AGENCY IN THE STATES

Charters of the American colonies, at least from the latter half of the seventeenth century, commonly provided for apportionment of elected representatives to the lower house of the colonial assembly. Similar provisions were included in the earliest state constitutions, regulating allocation of representation in the state legislature.[34]

From the outset, most state constitutions provided for some regular, periodic adjustment of representation to keep it at least roughly proportionate to population in at least one chamber of the legislature, but phasing of this operation to the

decennial federal census came to prevail only gradually. Several state constitutions drafted before the 1787 national charter adopted the seven-year cycle of English parliamentary elections; other states required reapportionment as frequently as every session (Iowa Constitution of 1846, for the house of representatives) or as infrequently as two decades (North Carolina and Maryland). Many northwestern states, from Wisconsin and Minnesota westward, provided for a second census to be taken between decennial federal censuses; legislative reapportionment was to occur after both the federal and state censuses. Montana adopted but never observed this pattern; Article VI, Section 2 provided for a census in 1895 and every ten years thereafter, with ensuing reapportionment (which would have been for two of the five legislative elections each decade) after both the state and federal censuses. This provision was deleted by the reapportionment amendment adopted in 1966.

Quite generally, the states have come to reapportion decennially after the federal census.[35] This appears currently to meet Fourteenth Amendment requirements of equal protection as interpreted in the federal courts, since the basis for determining the populations to be equalized is the decennial census (with occasional exceptions for a basis in registered voters). There is current discussion of a federal census every five years; the effect of this upon reapportionment practice can only be surmised. Since federal standards generally must be met where applicable, a modern state constitutional provision on this point might simply relate the frequency of reapportionment to the required standard of Fourteenth Amendment equal protection. Any provision that conflicted with that possibly evolving standard would in due course be held invalid anyway, as were some Montana constitutional provisions for reapportionment after the 1964 Supreme Court reapportionment cases.

Except in a few states where districting and apportionment arrangements were frozen in the constitution from the outset in 1776, the legislature was generally charged with responsibility to implement periodic reapportionments that would follow the initial constitutional allocation of legislative seats.[36] The literature of reapportionment, including Alfred Z. Reed's exhaustive study, is curiously silent about the eighteenth-century reasons for assignment of this function to the legislature. To have the legislature in effect determine the conditions of its own composition was scarcely consistent with concern for checks and balances among the several branches of government. We have noted that a century earlier, John Locke had not supposed the legislature would correct inequities or distortions of its representative base, and thought that the executive should restore the legislative branch to its intended bases of representation from time to time.[37]

Assignment of the reapportionment function to the legislature might have resulted from lack of experience with the difficulties involved in the process, or it may have been the product of distrust of the executive. Reed noted that prejudice against the colonial governors was expressed by enumeration of a limited number of executive powers in the early state constitutions, leaving "a broad field of administrative activity for which no constitutional organ was provided."[38] He found the first century of legislative experience to be somewhat bitter; state systems of districting and apportionment had two "especial weaknesses"--their complexity and the manner in which they discriminated against effective representation of urban centers.[39] There was a "very simply explanation . . . for the chaos and, from the point of view of the dominant city-dweller, the unfairness, of the prevailing legislature structure:"

> Provisions affecting the composition of the Legislature are what they are, because they have been drafted by members of already constructed Legislatures.
>
> That the Legislature cannot be entrusted to determine the rules of its own being, we have always assumed as axiomatic. And the wisdom of laying down constitutional rules of apportionment, and the beneficial working of these rules in the main, are clear . . . [contrasted with distribution of seats in the Imperial German Reichstag] . . . The reason why, however, we are in some danger of losing our comparative advantage is that Constitutional Conventions have been constructed on the model of one or both houses of the Legislature, and that the existing system of districts has thus been in a sense self-perpetuating.[40]

These words, written more than sixty years ago, may explain the fruits of the eighteenth-century decision to vest responsibility for reapportionment in the legislature itself, but they do not explain the basis for that initial decision.

There were a few early exceptions to legislative responsibility for periodic reapportionment. The initial failure of several state constitutions to make any provision for a reapportioning agency was associated with rigorous constitutional provisions that apparently were supposed to be self-executing; this seems to have been the case in Maryland from 1837 to 1851. In Massachusetts, from 1836 to 1857, the governor and council were charged with largely ministerial application of stringent constitutional regulations for reapportionment.[41] The Ohio Constitution of 1851 put the reapportionment function in an ex officio board of the governor, the auditor and the secretary of state.[42] Their function apparently was conceived to be

largely ministerial or non-discretionary; the assignment of house and senate seats among districts was defined in the constitution according to population ratios whose application was specified in the apportionment article. This arrangement followed fifty years of legislative reapportionment that has been described as "a politician's dream and a voter's nightmare."[43] Observing requirements of the Northwest Ordinance, the 1802 Ohio Constitution had required representation in both houses of the Ohio Legislature "according to the number of white male inhabitants."[44] In 1853 the Ohio Supreme Court described legislative apportionment under these provisions as "a most humiliating experience . . . with [legislative] scenes of anarchy and confusion [that] undoubtedly determined the people to deprive that body of [the function] absolutely."[45]

The Ohio Constitutional Convention decision in 1851 to establish an apportionment board reflected difficulties with gerrymandering, and with determination of an appropriate agency for subdivision of counties into single-member house districts. Summarizing more than a century of Ohio experience with the board, Jaffy concluded:

> The apportionment system designed in 1851 operated satisfactorily and did not engender many disputes. The Apportionment Board performed its ministerial duties each decade, and thus Ohio has been one of the few states which has reapportioned regularly without a single default. Litigation of Article XI was minimal; only three suits were instituted before 1961.[46]

Ohio's modern difficulties with reapportionment were the product of the 1903 "Hannah Amendment" that made every county a house district and guaranteed it at least one representative. As in Montana, such provisions created gross inequalities of representation in relation to county population in ensuing decades, and in 1964 a U.S. Supreme Court decision required Ohio to reapportion to standards declared in the 1964 reapportionment cases.[47]

Ohio's experiment with non-legislative reapportionment was not widely emulated during the century that preceded the reapportionment revolution of the 1960s. In 1954, constitutions of forty-two states still made the legislature the apportioning agency, and in thirty-nine of these, it was the sole agency.[48] In California, South Dakota and Texas, ex officio commissions were designated to reapportion if the legislature failed to accomplish the task, and Florida empowered the governor to call the legislature into special session to complete the task.

Three other states--Arizona, Arkansas and Missouri--had joined Ohio in placing the reapportionment function in a non-legislative agency.

By contrast in 1971, after a decade of experience with one-man, one-vote requirements for reapportionment, the constitutions of at least nineteen states involved some non-legislative agency in the apportionment process. These non-legislative or extra-legislative reapportionment agencies will be examined in two general groups--those that initiate the process outside the legislature, and those that involve a non-legislative agency only after legislative failure to complete the task.

Courts Backstop the Legislatures

The most obvious fact about reapportionment in the past decade is the massive involvement of both federal and state courts. Prior to 1962, state court involvement was not uncommon in some states, but federal courts were reluctant to intervene in state reapportionment responsibilities, even where congressional districting was the issue. The principal utterance of the United State Supreme Court had been Colegrove v. Green (1946) in which a singularly ambiguous set of opinions tried to explain the grounds for a decision not to require Illinois realignment of congressional districts whose boundaries dated from 1901.[49]

In 1962 all doubts were put to rest about the availability of federal courts to compel state legislative reapportionment. In Baker v. Carr, seven members of the United States Supreme Court agreed that a Tennessee federal district court had jurisdiction in equity to entertain a class action by Tennessee voters claiming that apportionment of the state legislature deprived them of Fourteenth Amendment equal protection of the laws. The Supreme Court directed the federal district court in Tennessee to hear the case.[50] The Baker decision prompted initiation of a large number of reapportionment cases in federal courts of various states, and in 1964 the Supreme Court held not only that congressional district populations must be equalized,[51] but also that population equalization must prevail in elections to all houses of state legislatures.[52]

Just as Justices Black and Rutledge had anticipated and Justices Frankfurter and Harlan had feared in 1946, courts in the 1960s declared apportionments to be invalid; enjoined further elections under them; referred the matter back to legislatures for corrective action, and sometimes assumed the responsibility to

"affirmatively re-map" when legislatures failed to respond in a manner satisfactory to the court. This happened in Oklahoma and Montana. Courts even ordered at-large election of a state legislature in Illinois (Frankfurter's ultimate horror in the Colegrove opinion had been at-large election of congressmen) pending satisfactory statutory or constitutional action.

There was widespread concern about judicial involvement in matters so elementally political, usually by the interests disadvantaged in the new reapportionment processes, including legislators who thought the job should be theirs even when they could not accomplish it. Some of the judges themselves apologized for their intervention. Senator Dirksen of Illinois made another valiant try to get a constitutional amendment that would give his name immortality. But by 1970, courts had become irretrievably involved as backstop agencies for legislative reapportionment.

Robert Dixon, a leading legal scholar with important reservations about judicial reapportionment, found an example of judicial involvement that he thought might serve as a model for states that did not develop some alternative to legislative-judicial reapportionment. In Illinois after legislative failure, involvement of the state supreme court (which wanted a panel of law-school judges to get the job done), and unsuccessful use of computers, a highly respected chief judge of a federal district court engaged both political parties in frank bipartisan negotiation through pretrial conference, narrowing their areas of disagreement and negotiating their acceptance of judicial choice to settle differences.[53]

By the end of the decade, federal courts had been drawn into reapportionment litigation in thirty-nine states (state courts also were involved in eighteen of these states), and state courts alone were involved in nine other states. In only two states (Kentucky and South Dakota) neither state nor federal courts were drawn into reapportionment actions during the decade. Had their reapportionments been challenged, however, both probably would have been found invalid by equal protection standards that had evolved late in the decade.[54] In at least fourteen states, including Montana, some sort of constitutional revision brought basic law into conformity with the new "one-man, one-vote" standards of the Wesberry and Reynolds cases.

Some state constitutions expressly involve the state's highest court to backstop the legislature at a specified juncture, or in response to a suit to compel performance. For example, if the Maine legislature fails to reapportion, the supreme court "shall, within 60 days . . . make the apportionment."[55] The proposed Rhode Island Constitution of 1968 would have given the state supreme court six months to reapportion the state after failure of the legislative session following a federal or state census to accomplish the task.[56]

Constitutions of many states now expressly give a kind of ultimate backstop role to the highest state court by provisions for original jurisdiction of suits to compel or to review reapportionment performance by whatever agency the constitution specifies for the task. These provisions are particularly common in constitutions drafted within the past decade, including those of Arkansas, Hawaii, Illinois and Michigan.[57]

Some constitutions specify time limits for the judicial involvement, either to expedite the process where judicial involvement is an indispensable element to get the job done,[58] or to limit the time within which a voter may challenge a reapportionment--in effect, to put the matter to rest until the next periodic reapportionment is required.[59]

Some state constitutions seek to give "exclusive" jurisdiction to state courts in reapportionment matters, but this probably does not preempt jurisdiction of a federal court disposed to review a state apportionment for conformity to equal protection standards.[60]

The Council of State Governments reported in December, 1971 that twenty-nine states had redistricted their state legislatures since the 1970 census, but that sixteen of these reapportionments had been challenged in the courts, and in at least six states, including Montana, courts had invalidated at least one reapportionment. Congressional districting had been accomplished in twenty states, including Montana.[61]

Backstop Reapportionment Agencies

Several states involve their elected state officials to backstop the legislature if it fails to reapportion. Florida requires the governor to call the legislature back into a special session restricted to reapportionment; more commonly, a number of elected state officials, sometimes sitting with

designated legislative leaders, are constituted as a special ex officio board to reapportion after legislative failure. Such arrangements must be classified as partisan in approach, because there is no assurance of bipartisan balance among a designated group of elected state officials. Because of their statewide constituencies, they also may be predisposed to favor interests that hold a statewide plurality among electors--notably, the large cities in some states. Several states, including most recently Illinois, have constituted special bipartisan commissions to backstop the legislature in order to maintain balanced consideration of partisan political interests.

Dixon, writing late in the 1960s, brushed aside "extensive elaboration" of the experience with backstop arrangements in most of these states "because none of the provisions played a major role in the reapportionment revolution of the 'sixties'."[62] This does not diminish their possible intrinsic interest for constitution-writers of the 1970s, because many of the states expected the backstop arrangements, like the entire reapportionment function, to be performed only in the year or so immediately following a census. By implication or by express statement [South Dakota Const. Art. III, Sec. 5], function of the backstop agency later in the decade could have been challenged as unconstitutional.

Examples of backstop agencies:

Florida. If the Florida legislature adjourns the session in the second year after the decennial census without having reapportioned, the governor is to call a special session limited to reapportionment business "and it shall be the mandatory duty of the legislature to adopt a joint resolution of apportionment." Should this fail, the state's attorney general is required to petition the state supreme court to make the apportionment; the supreme court is given sixty days from the filing of this petition to complete the job.[63]

Oregon. If the legislature fails to reapportion in the session following the decennial federal census, or if the state supreme court determines that the legislative reapportionment does not comply with constitutional requirements, the secretary of state is required by the constitution to draft a reapportionment plan for approval by the state supreme court. In 1961 the state supreme court invalidated a legislative reapportionment of that year and directed the secretary of state to draft a new reapportionment, which was ordered into effect by the court. In 1967 the legislature adjusted congressional district boundaries.[64]

California. If the legislature fails to reapportion in the session following a federal decennial census, the constitution designates the lieutenant governor (as chairman), the attorney general, the state controller, the secretary of state and the state superintendent of public instruction to complete a reapportionment.[65] In 1965, under strict orders of the state supreme court either to reapportion to its judicially defined standards of equal representation or to accept a court-devised plan, the California legislature managed a satisfactory reapportionment.[66]

Oklahoma. If the first regular legislative session following the decennial federal census fails to reapportion, the attorney general, the secretary of state and the state treasurer are designated ex officio to reapportion by majority vote within sixty days.[67]

North Dakota. If the legislature adjourns the first session after a decennial federal census without completing a reapportionment of the house of representatives, the chief justice of the supreme court, the attorney general, the secretary of state and the majority and minority leaders of the house of representatives are designated an ex officio apportioning board to complete the task.[68] In 1961 the commission reapportioned the house after legislative failure and a federal court sustained this plan pending further legislative action. But eventually a three-judge federal district court reapportioned both chambers in 1965.[69]

South Dakota. If the legislature following a federal decennial census adjourns without completing a reapportionment, the constitution designates the governor, superintendent of public instruction, presiding judge of the supreme court, attorney general and secretary of state as an apportioning board to complete the task.[70] The legislature reapportioned in 1961 and again in 1965; the latter reapportionment was not challenged in the courts but probably would not have been sustained under equal protection standards that came to prevail in the latter 1960s.[71]

Texas. If the legislature fails to complete a reapportionment in the session following a decennial federal census, the lieutenant governor, attorney general, controller of public accounts, commissioner of the general land office and speaker of the house of representatives are constituted an ex officio legislative redistricting board to complete the reapportionment within ninety days of the legislative adjournment.[72]

New Mexico. The rejected draft constitution of 1969 would have had the governor appoint a five-member reapportionment commission to act if the legislature failed to reapportion in

the first regular session after the decennial federal census. The commission would have been required to submit a plan to the state supreme court within ninety days "for approval as to legal sufficiency and compliance with this article." The court-approved commission plan would become law.[73]

Connecticut. The 1965 Connecticut Constitution established an elaborate set of arrangements--including a backstop commission--to complete reapportionment in the event of legislative failure. The initial responsibility of the legislature to reapportion after each census must be discharged by an exceptional two-thirds vote of each house. If (when?) this fails, an eight-member bipartisan commission constituted by legislative leaders next has responsibility to prepare a reapportionment; the house speaker and minority leaders, and the senate president pro tem and minority leader each designate two members whom the governor then appoints to the reapportionment commission. If six of these eight commissioners cannot agree upon a reapportionment, the house speaker and house minority leader each designate a superior court judge to serve on a board; these judges select "an elector" as third member of the board. This board, by a majority of two members, is charged with developing a plan which becomes the reapportionment.[74]

This complex reapportionment program was developed after the two major parties managed a successful legislative reapportionment by direct negotiation in the mid-1960s. But the Constitutional Convention that drafted the program had itself been required by the federal court that "led, pushed, and hemmed in" the whole process. The Connecticut plan almost seems designed to move through all of its projected stages; this may have occasioned an evaluation that "Connecticut provided no 'method' for export to other states."[75]

Illinois. In 1954, an Illinois constitutional amendment constituted a bipartisan apportionment commission to function if the legislature failed to reapportion the house of representatives. The governor would appoint five members from each of the two principal parties from nominees submitted by the state party central committees. If the commission failed to agree upon a reapportionment, the house would be elected at large. That entire scenario unfolded after 1960, prior to federal court intervention mentioned earlier. Of the earlier Illinois experience, Dixon commented that creation of the commission relieved the legislature of ultimate responsibility, while providing no tie-breaking vote in case of commission deadlock--which happened; he thought at-large election seemed more appropriate as a sanction to compel legislative action than as a constituted recourse in case of commission failure.[76]

The Illinois Constitution of 1970 provided for a differently constituted backstop apportionment commission. If the legislature fails to redistrict the state by June 30 of the year after the decennial census, an eight-member commission is constituted: the speaker and minority leader of the house, and the president and minority leader of the senate each designates a member of his own chamber and another person who is not a legislator to the commission. The commission, acting by majority of five, is expected to submit a redistricting plan by August 10; if it fails, the secretary of state draws the name of one of two persons designated by the state supreme court to serve as a ninth tie-breaking commissioner, and the commission then has until October 5 to submit a plan by five-member majority vote. The constitution is silent about what happens if the commission fails at that stage; but the state supreme court is given "original and exclusive jurisdiction over actions [initiated by the attorney general] concerning redistricting the House and Senate."[77]

Non-legislative Agencies to Initiate Reapportionment

Two elements in particular have characterized some of the more recent constitutional arrangements for legislative reapportionment:

(1) The legislature has been substantially or entirely supplanted as the agency with reapportionment responsibilities;

(2) Special bipartisan reapportionment agencies have been constituted to allow for responsible expression of the partisan interests involved.

The two elements appear in differing combinations. Alaska, Arkansas and Arizona took the function away from the legislature, but left it in partisan executive hands. Missouri, Michigan, New Jersey, Hawaii and Pennsylvania developed special bipartisan commissions in various forms. The draft constitutions of New York and Maryland, rejected for reasons other than their apportionment proposals, contained features deserving particular comment at a later point.

Non-legislative reapportionment agencies include:

Arizona. The Arizona Constitution long has required the secretary of state, every fourth year, to certify the number of

house members to be chosen from each county, according to elaborate constitutional standards for districting and apportionment. In 1954, an American Political Science Association study of state legislatures characterized the arrangement in Arizona as "the nearest approach to an automatic system" and thought it merited consideration in other states because "the bottleneck of the apportioning agent is broken by removing legislative control entirely, and in effect . . . resting the apportioning function with the electors themselves" because the periodic reapportionments were to be based for each county upon the vote cast for governor in the previous election.[78]

But experience in the 1960s indicates that the "automatic" provisions resting upon rigid constitutional prescriptions do not work when federal constitutional norms of equal protection are to be effectuated. Reapportionment in Arizona has been almost continuously before a federal district court that reapportioned the state in 1965, and litigation was still before the United States Supreme Court in 1971.[79]

Alaska. The 1956 Alaska Constitution made reapportionment an executive responsibility closely following the National Municipal League's Model State Constitution [Art. IV, Sec. (4.04).] The governor's responsibility to reapportion membership in both houses arises "immediately following" each decennial federal census. For performance of this function the constitution requires establishment of an advisory apportionment board; the governor appoints its five members, including one from each of four constitutionally designated regions, "without regard to political affiliations;" but "none . . . may be public employees or officials." This board must prepare and submit a plan of districting and reapportionment to the governor within ninety days. The governor within another ninety days must proclaim a redistricting and reapportionment; if he revises the board's plan he must explain his changes.[80]

Arkansas. The governor is chairman of a mixed "board of apportionment" that includes the elected attorney general and secretary of state along with two non-legislators designated by each house. This board "shall divide the state into house and [single-member] senate districts" unless the state supreme court revises the plan for "any arbitrary action or abuse of discretion by the board."[81]

The three-member Arkansas board reapportioned both houses of the legislature after a federal court in 1965 found them to be unconstitutionally malapportioned; controversy continued into 1969 in efforts to compel adoption of single-member districting.[82]

Missouri. The 1945 Missouri Constitution was apparently the first to establish a special bipartisan reapportionment commission of ten members to reapportion the senate.[83] The governor named five commissioners each from lists of nominees submitted by the state party central committees.[84] It has been pointed out that this is not strictly bipartisan because of the opportunity given the governor in a "one and one-half party state" to select "nominal" partisans from the minority Republican Party.[85]

After federal court intervention the commission reapportioned the senate in 1965; after voters rejected a legislative reapportionment of the house in that year, a 1966 constitutional amendment created a second twenty-member bipartisan commission for house reapportionment. This commission is designated by the governor from nominees submitted by congressional district committees of the major parties.[86] This body successfully reapportioned the house in March 1966 without partisan deadlock.

There is a backstop arrangement to operate if either Missouri reapportionment commission should deadlock: the supreme court can appoint the six supreme court commissioners (three from each party) to complete the task. Lack of deadlock in the primary commissions obviated need to call this backstop agency into operation during the 1960s, but there seems little reason to suppose that it would be less prone to deadlock than the larger commissions.[87]

Michigan. The 1963 Michigan Constitution established an eight-member bipartisan legislative apportionment commission to which the state organizations of the two major parties each designate four members (one from each of four regions defined in the constitution); the eight commissioners elect one of their members to serve as chairman and have 180 days after census data is available to district and apportion both chambers. If no five-member majority can agree upon a plan, individual commissioners can submit plans to the state supreme court which then orders adoption of the plan that "complies most accurately with the constitutional requirements."[88]

Late in 1963 the Michigan commission tried to reapportion the state, but no plan could muster a five-member majority and four different plans were submitted to the state supreme court early in 1964. None of these conformed to requirements of the 1964 reapportionment cases and the state supreme court ordered the commission to try again; again it deadlocked and eventually the court selected a plan submitted by two Democratic members that most nearly met one-man, one-vote standards.[89]

In Michigan, a state with strongly bipartisan politics, deadlock of an evenly balanced bipartisan commission with no tie-breaking vote seemed predictable. Moreover, the constitution made no provision for vital working data generated by the commission to be transmitted to the court for its backstop performance. The constitutional requirement that the court simply adopt one of the commissioner-developed plans, with no judicial authority to modify it, in effect guarantees judicial adoption of a partisan reapportionment plan.[90]

New Jersey. A 1966 constitutional amendment established a bipartisan commission to reapportion the New Jersey legislature. The state chairman of each major political party appoints five members to the commission, giving "due consideration" to geographical distribution of the membership, by November 15 of the federal census year. By February 1 of the year after the census, the commission by majority vote is to develop a reapportionment. If it deadlocks, the chief justice of the supreme court names an eleventh tie-breaking member of the commission, which then has another month to complete its task.[91]

The first commission "as expected" deadlocked in 1966 and an eleventh member was designated. The eleven-member commission then developed a reapportionment that was challenged immediately in the courts, and the state supreme court made several changes in the commission plan in further litigation that extended into 1969.[92] Dixon described changes made by the court in 1967 as "nit-picking" and thought the New Jersey commission plan had "strong claims to near-model bipartisan apportionment" because the tie-breaking eleventh member assured achievement of a plan constructed on a basis of sound and adequate political information. He thought the plan could be further improved by requiring judicial challenges of commission reapportionments to demonstrate "invidious political or racial effect" rather than simply to "shave a few population percentage points in one corner of the state." Moreover, the New Jersey plan "entirely precludes legislative action" on reapportionment.[93]

Hawaii. The 1968 Hawaii Constitution provided for a bipartisan nine-member "legislative reapportionment commission" to reapportion the state every eight years. The majority leaders of each legislative chamber designate two commissioners each; a member of the minority party in each chamber designates two commissioners; the eight commissioners, by a vote of at least six, elect a ninth member to serve as commission chairman. On each island, an advisory council is created to advise the commission "for matters affecting its island unit."

The commission, by six-member majority, submits a reapportionment plan to the state elections officer, effective upon its publication.[94]

Pennsylvania. In 1968, a constitutional amendment established a five-member legislative apportionment commission to reapportion in the year following the decennial federal census. The majority and minority leaders of each legislative chamber "or deputies appointed by each of them" comprise four members, who then select a fifth to serve as chairman; if they cannot agree upon a fifth member, that member is designated by a majority of the state supreme court justices. Acting by majority vote, the commissioners file a "preliminary" reapportionment plan with the state elections officer within ninety days of the availability of census data. If no exceptions to this plan are filed within thirty days, it becomes law; but the state supreme court can return the plan to the commission, with instructions for revision. If no majority of the commission can agree upon a plan, the state supreme court serves as a backstop; it may proceed "on its own motion to reapportion the commonwealth."[95]

New York. The 1967 New York draft constitution proposed establishment of a five-member redistricting commission in the same general pattern as that adopted in Pennsylvania a year later. The temporary senate president, the assembly speaker, the minority leaders of each house and the chief judge of the court of appeals would designate one commissioner each by March 1 of the year following the decennial federal census. The commissioner designated by the state's highest court would be chairman. The commission would have ninety days, acting by majority vote, to reapportion both legislative houses and congressional districts. The plans as certified to the governor would become law, and the state court of appeals would have had original and exclusive action to adjudicate contests of the plans.[96]

Despite partisan opposition to the use of bipartisan or "nonpartisan" reapportionment commissions in New York, the court of appeals eventually constituted an *ad hoc* five-member commission with one member from each major party and three "referees" to develop the reapportionment that ultimately was sustained in both state and federal courts.[97]

Maryland. The rejected 1968 draft constitution of Maryland proposed establishment of a nine-member bipartisan legislative redistricting commission; the majority and minority leaders of

each legislative chamber would designate two commissioners each and the governor would appoint a ninth commissioner to serve as chairman with a tie-breaking vote. No commissioners could be elective state officials. By majority vote, the commission would submit a reapportionment plan to the governor who would transmit it to the legislature convening in the second year after the federal decennial census. If no other plan were prescribed by law within seventy days after the commission plan was transmitted to the legislature, the commission plan would have become law. The state court of appeals would have had original jurisdiction to review any legislative plan proposed as a substitute for the commission plan; if the legislative plan were found invalid, the commission plan would become law unless it, too, was held invalid. In that eventuality the court of appeals would "grant appropriate relief for the conduct of the impending election."[98]

Dixon, commending the Maryland proposal, noted that it gave the legislature an opportunity to reapportion if it could agree upon a plan; yet a governor who preferred the commission plan could veto a legislative plan so that the commission plan would become law unless the legislature could override a veto.[99]

The Maryland Constitution was amended in November, 1970 to achieve one of the objectives of the 1968 draft--that there be <u>some</u> reapportionment in effect when the legislature fails to reapportion. "Following each decennial census" the governor is to prepare a reapportionment plan to be submitted to the legislative session convening the second year after the census. If the legislature fails by the forty-fifth day of that session to enact a reapportionment, the governor's plan "shall become law." This arrangement combines gubernatorial initiative of the Alaska type with the provision that appeared in the 1968 Maryland draft constitution to give the legislature a chance to reapportion itself. A modified and more elaborate version of the new Maryland reapportionment process will be presented to the voters for ratification in November, 1972.[100]

Summary: Development of Reapportionment Agencies

In 1954 there were few <u>formal</u> departures from the tradition of the 1770s that American state legislatures would reconstruct themselves periodically to reflect shifting patterns of residence among the populations they represented. But there were numerous departures <u>in practice</u>, for not a few legislatures

had ignored specific requirements of their state constitutions in this regard for as much as half a century. In 1954 only four states had placed initial responsibility for legislative reapportionment in a non-legislative agency--the ex officio executive boards or officers of Ohio, Arkansas and Arizona and a special commission in Missouri. Nearly a century had separated Ohio's 1851 adoption of reapportionment by executive officers from Missouri's 1945 adoption of reapportionment by special bipartisan commission. Three other states--California, South Dakota and Texas--had established backstop agencies other than their courts to reapportion after legislative failure at the task.[101] Only about one in seven states had made any systematic departure from the traditional arrangements.

A decade later the United States Supreme Court consummated the "one-man, one-vote" revolution with its reapportionment cases of 1964. By the end of that stormy reapportionment decade, federal and/or state courts in forty-eight states had been drawn into review of reapportionments, and more than one third of the states had developed some specialized non-legislative reapportionment agency either to initiate the matter or to backstop legislatures that failed the task.

By the reapportionment year 1971, constitutions of at least nine states placed responsibility for legislative reapportionment entirely outside the legislature in a special reapportionment agency, and draft constitutions of two other states had proposed similar arrangements.[102] Nine other state constitutions had established special non-legislative officers or agencies other than the courts to backstop legislatures that failed to reapportion; the draft constitution of a tenth had made a similar proposal.[103]

Contemporary recognition of legislative difficulties with reapportionment is impressively indicated by the fact that ten of fourteen major state constitutional revisions since 1954 considered a non-legislative agency desirable either to initiate reapportionment[104] or to serve as a backstop.[105] Three others (Florida, Rhode Island 1968 draft and Idaho 1970 draft) specifically vested backstop responsibilities with the governor and/or the state supreme court, and only the 1970 Virginia Constitution among modern charters left the traditional responsibility of the legislature unqualified.

Courts aside, no state has precisely followed the lead of another state in developing non-legislative apportioning agencies. In the following analysis of agency structures, the functional differences between initiatory and backstop

agencies are ignored. Three general conformations of non-legislative apportioning agencies can be identified, each representing attempts to avoid disadvantages discovered in earlier forms.

1. The 1851 Ohio pattern, vesting reapportionment in a board of elected executive officers serving ex officio, was followed with minor variations in California, Oklahoma, North and South Dakota, Texas and Arkansas.[106] This was the first pattern of non-legislative reapportionment agency to appear, and it preceded the 1964 reapportionment revolution in both time and spirit. The task of the ex officio executive officer or board was conceived to be essentially ministerial--to make a mechanical application of rather precise constitutional rules to new population distributions revealed by periodic censuses. Since this was not thought to involve much discretion, the fact that the agents were state officials elected as political partisans seemed not to be a serious disadvantage, nor did it appear significant that their statewide constituency might influence their judgments about desirable contours of districts and apportionments. Most of these matters were pretty much locked up in the constitution anyway.

But application of "one-man, one-vote" principles to reapportionment virtually destroyed the utility of constitutionally defined districts and apportionment ratios. General standards of reapportionment such as compactness and contiguity of districts, specification of single-member and/or multi-member districts, maximum, minimum, or range of size of chambers and equalization of populations or representation ratios among constituencies still seemed desirable constitutional material after 1964. But it was widely recognized that detailed application of these norms by an apportioning agency involved many complex decisions with significant but varying political consequences, whatever the intent of the apportioning agency, and whether that agency be the legislature, a court or a specialized commission. There also was increasing belief that no agency, even a court, either could or should ignore the political implications and consequences of reapportionment decisions.

2. In 1945 Missouri broke from the Ohio pattern to develop the second principal type of reapportionment agency--a special commission expressly structured on bipartisan lines, constituted by party leaders or appointed from party-designated nominees, with equal numbers from each of the major parties. In a sense the Missouri senate reapportionment commission of ten members (dating from 1945) and its twenty-member house reapportionment commission (established in 1966) might be regarded as an effort to establish non-partisanship, because each major party had an equal number of seats on the commission.

Illinois in 1954, Michigan in 1963 and New Jersey in 1966 followed the Missouri commission pattern; each has individual variations, but all were evenly bipartisan, comprising equal numbers of members designated by state party leaders. These commissions were thought to have several advantages compared with the Ohio pattern: they acknowledged the partisan interests involved in the reapportionment process, at least where the constitution allowed discretion about districting and apportionments; fairness was sought in an evenly balanced, hands-above-the-table agency. The prototype Missouri commissions performed adequately in the troubled 1960s. But in Illinois, Michigan and New Jersey, all with stronger two-party traditions than Missouri, the even-numbered commissions deadlocked during the 1960s. New Jersey had provided for an additional tie-breaking member in case of deadlock, and its commission, thus reconstituted, made an apportionment that became effective after minor judicial modifications.

Connecticut in 1965 developed a transitional form of commission that reflected Missouri-form influences but anticipated the third kind of commission. Majority and minority legislative leaders, rather than state party agencies, designated an equal number of commissioners to an eight-member commission.

3. The third principal form of specialized apportionment agency, still a variation on the Missouri plan, appeared in the New York draft constitution of 1967, in the Hawaii and Pennsylvania constitutions of 1968, and in the Maryland draft constitution of 1968. Illinois followed suit in 1970, reconstituting its earlier Missouri-form commission. In all of these commissions, an equal number of commissioners is designated by the majority and minority legislative leaders, as in the 1965 Connecticut plan; but a tie-breaking additional member is added to the original designees either by their election or, failing their agreement, by some other agency--usually one or a majority of the judges of the highest state court. The Maryland draft constitution would have had the governor appoint the tie-breaking chairman. Like the earlier Missouri-form commissions, these are openly bipartisan agencies but with a tie-breaking member to reduce the likelihood of deadlock. The New York, Maryland, Pennsylvania and Illinois commissions would act by simple majority, the Hawaii commission by a two-thirds majority.

The Maryland draft constitution of 1968 proposed still another variant--of procedure rather than form--that may appeal to those who would retain some legislative role in reapportionment beyond designation of members of the reapportionment commission. In the year following the census, its commission

would prepare a reapportionment to be seasonably presented to the legislature. The legislature could within a reasonable specified time (seventy days in the Maryland prototype) either modify the commission reapportionment or substitute one of its own--assuming ability to agree upon such substitution or modification. But at adjournment of the legisative session following the census, there would be either a commission-developed reapportionment or a legislative apportionment in existence with the force of law. By 1970 constitutional amendment, there will be a gubernatorial reapportionment in effect if the Maryland legislature fails the task in 1972.

Provisions in other commission arrangements suggest several possible variants on this Maryland plan; the tie-breaking member need not be appointed by the governor, but could be selected by a majority of state supreme court members, or even by lot from among nominees of the governor or of the court. Since the state court will have jurisdiction to review any plan from either commission or legislature, it might be considered unwise to involve judges in service on the apportionment commission, but it might be relatively harmless for supreme court judges to designate the tie-breaking member of the apportionment commission. Moreover, while the Maryland governor would have had veto power over a legislative reapportionment or modification of the commission reapportionment, such a veto power could be expressly withheld if that seemed desirable, leaving ultimate review of the adopted reapportionment only by judicial action.

CONSTITUTIONAL STANDARDS FOR THE APPORTIONING AGENCY

No sharper example of "dead-hand" constitutional politics need be sought than the rigid districting and apportionment formulas written into state constitutions in the nineteenth century. If those statements of standards appear in retrospect to have been efforts to "take out the politics" from decennial reapportionments, such a view ignores the controversy that attended their creation. In the twentieth century, Montana,[107] like the rest of the country, simply grew out from under the assumptions and decisions of an earlier day. By 1960 the Montana constitutional standard "even-handedly" gave one senator each to Petroleum County (population 894) and Yellowstone County (population 79,016). The four most populous counties, with more than a third of the state's population, and the four smallest counties, with less than 1 percent of the state's population, were equally represented; each group had four senators.

The one-man, one-vote revolution swept away that archaic structure, and a new constitutional convention must consider to what extent it wishes its view of life to shape legislative representation for an unforeseeable future.

Requirements that districts be constructed from whole counties or combinations of whole counties and that apportionments must start with a first representative for some basic representation unit have proven to be incompatible with legislatures of reasonable size. But generalized requirements that districts be compact, of contiguous territory and equal in population are common in modern state constitutions. Modifiers like "as possible" or "as practicable" or "due regard" are sometimes added, but they raise the general problem that words added to state constitutions often restrict and rigidify future options. In the reapportionment process, they also may increase the opportunities for litigation to upset the process. Many state constitutions foreclose the option between single-member and multi-member districts, evidently on the ground that this fundamental decision about the nature of representation belongs in the constitution rather than in the legislature itself.

Size of Chamber

Modern state constitutions commonly either fix the size or the range of size of the legislative chambers.[108] Reapportionment considerations are involved in either approach. A

constitutionally mandated size removes that factor from negotiation or policy decision by the apportioning agency, but may create a situation where the ratio of seats to total population proves particularly awkward. A range of size opens that factor to policy decision by the apportioning agency and allows flexibility to seek out a size for which the ratio of seats to total population has a superior "fit" to local populations and existing districts.

Reapportionment history suggests the value of an upper limit on membership to check the natural political tendency to create more seats, rather than to reduce the number. This may be particularly important where multi-member districting is common: in such instances, reapportionment would tend to leave as many constituencies undisturbed as possible, simply adding seats for the rapid-growth districts. Conversely, a minimum size may have particular value if single-member districting is the pattern, for two reasons:

1. With a relatively large number of districts to redefine at each reapportionment, the problem is simplified technically, if not politically, by having fewer districts.

2. The larger the average population per district, the greater the absolute variance of population for a given percentage of variance. This might induce the reapportioning agency seeking small percentage variances among districts to create fewer, larger districts.[109]

There is no objective base for determining ideal size of a legislative chamber. Among American state legislatures, some of the most populous states have some of the smaller chambers, while some of the least populous have very large legislative chambers. Each California state senator represents about seven-tenths as many people as the entire population of Montana. Only Georgia (56), Illinois (58), Iowa (61), Minnesota (67), and New York (57) have larger senates than Montana. Twenty senators suffice in Alaska and Nevada, 28 in Utah, 30 in Arizona, Oregon and Wyoming, 31 in Texas, 35 in Colorado and South Dakota and 49 for the entire Nebraska unicameral legislature. Twenty-three states have larger houses of representatives than Montana's 100 members, ranging up to 400 in New Hampshire, for a population about the same size as Montana.

If Montana were to impose the national average of constituents per state legislator, the state would have a senate of only eight members and a house of only twenty.[110] A particular state is apt to establish this factor as a balance among several considerations--historical tradition, strength of

regional sensibilities, the comfortable seating capacity of existing chambers and an ultimately political balance between efficiency in smaller size versus pluralism and diversity of representation presumed in larger size.

Reduction of size beyond some undetermined minimum would have two objectionable results: too few members to fill out a diversified committee structure, and an acute sense of loss of representation in some areas of the state. In Montana, the physical size of legislative districts must also be considered. With the present senate of fifty members, some districts comprise four or five counties and have physical dimensions in excess of 200 miles.

Population Base

Most states rest legislative representation on total population enumerated in the most recent federal or state census, but a few restrict the base. Alaska [Art. VI, Sec. 3] limits the base to "civilian population" and Hawaii [Art. III, Sec. 4] to the "number of voters registered in the last preceding general election."[111] New York's apportionment to citizen population and Tennessee's base of "qualified voters" have been sustained by federal courts.[112] The Arkansas Constitution [Art. 3, Sec. 3] excludes from the population base the inmates of prisons and mental institutions and persons not legal residents. Restrictions that diminish the total population base may be sustainable legally if they do not deprive eligible voters of representation or persons of the equal protection of the laws (such as freedom from taint of discrimination against particular minorities).[113]

The present Montana constitutional provisions [Art. VI, Sec. 2] that the legislative chambers "shall be apportioned on the basis of population" and congressional districts [Art. VI, Sec. 1] "as may be prescribed by law" seem entirely consistent with requirements of the national Constitution. The 1968 Rhode Island draft constitution [Art. IV, Secs. 4, 5] labored the obvious with a provision that the apportionment base must be "population consistent with federal constitutional standards."

Standards of Equality

Many modern state constitutions explicitly state the equalization to be achieved among legislative districts. Several

formulas appear; ranged from the most rigorous to the most flexible, they require:

--"Equal population" [Idaho 1970 draft constitution, Art. III, Sec. 4].

--"Equal as possible" [Rhode Island 1968 draft constitution, Art. IV, Sec. 5].

--"Equal as practicable" [Arkansas Constitution, Art. III, Sec. 3; Virginia Constitution, Art. II, Sec. 6; Pennsylvania Constitution, Art. II, Sec. 16; New York 1967 draft constitution, Art. III, Sec. 2c].

--"Substantially equal" [Illinois Constitution, Art. IV. Sec. 3a; Maryland 1968 draft constitution, Art. III, Sec. 3.04; New Mexico 1969 draft constitution, Art. III, Sec. 5].

--"In accordance with the constitution of the State and of the United States" [Florida Constitution, Art. III, Sec. 16].

The most rigorous formulas present potentially serious problems. If the stated standard is absolute equality, it is unattainable; if the standard is equal "as possible" or "as practicable," any reapportionment may be subjected to unsettling challenge by petitioners appearing in court with a plan that shaves a percentage point or so from the one adopted by the apportioning agency. The 1969 federal case on congressional districting, Kirkpatrick v. Preisler,[114] seems to have said that the apportioning agency did not show good faith when it adopted a plan with wider population variances than another plan that had been before it. This strategy was involved in the judicial challenge to the 1971 Montana reapportionment acts[115] and could furnish a basis for appeal from the district court decision sustaining that reapportionment. Of course that litigation indicates that the problem can be pleaded even in the absence of a rigorously stated population standard in a constitution. But the statement might give increased substance to such challenge. Dixon favors the "substantial equality" formula as one that meets both Fourteenth Amendment requirements and considerations of fair and effective representation.[116] The Florida formula--accord with state and federal constitutional standards--would accommodate any subsequent relaxation of current Fourteeenth Amendment standards, however broad. It would cover the 1966 Montana constitutional amendment [Art. VI, Sec. 2 (3)] to permit return to one-senator-per-county representation when allowed by the national Constitution.

Several constitutions that employ the "equal as possible" or "equal as practicable" standard also require single-member districts. It does not appear that these formulas necessarily would create difficulties for multi-member districting so long as the quotient derived from dividing the total district population by its number of representatives is substantially equal in all instances.

It seems clear that the current Montana constitutional provision [Art. VI, Sec. 2 (1)] that "the senate and house of representatives of the legislative assembly each shall be apportioned on the basis of population" meets current or anticipated constitutional requirements of the national Constitution regarding the standard of equality.

District Contours

Older state constitutions commonly required preservation of county or district boundaries in reapportionment. These requirements often were incompatible with "one-man, one-vote" redistricting--particularly in combination with constitutional assignments of minimum or fixed numbers of representative seats to such subdivisions. The 1889 Montana Constitution proved to be archaic in both respects. The 1966 constitutional amendment to Articles V and VI created districting requirements that are essentially in line with the modern state constitutions--with one possible exception. Article VI, Section 3 now states:

> Senatorial and representative districts may be altered from time to time as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the districts as compact as may be.[117]

An argument might be made that this language prohibits combination of portions of counties with other counties, as was done in reapportioning the 1971 Montana Legislature. But if tested in court, the districting probably would be sustained at the expense of the constitutional language, or the language might be simply construed to permit combination of portions of counties.

A simple statement that "districts shall be contiguous and compact as may be" would reflect the pattern common in most modern constitutions and might be distinctly more desirable than the language in some of them. Nearly all the modern constitutions require districts to be both compact and contiguous in territory, but a few require only one of the two standards.[118]

Several modern constitutions still state the desirability of districting that follows boundaries of existing political subdivisions; these provisions are tempered by an escape clause such as "due regard" or "wherever practicable."[119] The New Mexico draft constitution of 1969 [Art. III, Sec. 5(c)] would have required districting by "whole administrative election districts." This could have proved troublesome when precinct boundaries did not coincide with the boundaries of census enumeration districts. Precinct and census enumeration district boundaries frequently do not coincide in Montana, and the 1971 Montana House Committee on Reapportionment tinkered through most of the regular session with reapportionment plans based upon populations imputed to precincts, rather than populations actually enumerated in 1970 census enumeration tracts. The risk that such an imputed population base would have been invalidated in a court challenge was very high, and the reapportionment act eventually passed in the second special session used census division boundaries rather than precincts where counties were divided.[120]

As just noted, the Maryland and New York draft constitutions proposed that "natural boundaries" or "natural geographic boundaries" also be considered in redistricting. The Hawaii and Michigan constitutions contain specific references to problems raised by non-contiguity of territory separated by substantial expanses of open water, but these seem not relevant for Montana.

Several constitutions attempt to recognize cultural homogeneity as a desirable factor in districing. The Alaska Constitution [Art. VI, Sec. 6] requires "as nearly as practicable a relatively integrated socio-economic area" and the Hawaii Constitution [Art. III, Sec. 4 (8)] states that "where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided." Such provisions might be guarded recognition of special minority problems in the two westernmost states; they could be double-edged if applied to achieve segregation of racial representation rather than the affirmative values of equal protection for minorities. The Michigan Constitution [Art. IV, Sec. 3] seems to imply a standard of internal coherence that might have some interest in Montana; Michigan districts are to be not only compact and contiguous, but "convenient."

It can be argued that the constitutional statement of such criteria multiplies the opportunities for judicial challenge of reapportionments, and that contour requirements beyond compactness and contiguity should be entrusted to statute or the discretion of the reapportioning agency. In effect, the constitutions that omit requirements resolve the matter in that fashion.

Single- or Multi-Member Districts

Robert Luce wrote forty years ago that "the most difficult and most controverted problem of apportionment concerns the number of members to be elected from a district."[121] At mid-century there was substantial debate among political scientists about which style of districting had prevailed in the past.[122] Some of the confusion arises from difference of emphasis and whether districts or representatives are counted. It appears that at mid-century and on the eve of the reapportionment revolution of the 1960s, more American state legislators were elected from single-member districts than from multi-member districts. Klain's tally for 1954 indicated that about 88 percent of all state senators and about 55 percent of state representatives were elected from single-member districts.[123] This compares closely with a tally made in 1962 indicating that single-member districts prevailed by at least three-to-one in lower chambers, and at least twelve-to-one in state senates. In that year, 84 percent of all state senators and 54 percent of all state representatives were elected from single-member districts.[124]

The effect of massive and basic reapportionment on districting patterns during the past decade is not readily discerned at this juncture. In 1970, twenty-six of fifty state senates and seventeen of forty-nine state houses of representatives were elected exclusively from single-member districts, and in those chambers electing partially from multi-member districts, a majority of districts (if not members elected) were single-member.[125]

Of more interest for Montanans has been the Treasure State's experience with the choice between single-member and multi-member districting. For a century the preponderant majority of Montana territorial and state legislators were elected from single-member districts; all senators had been elected from single-member single-county districts from 1889 and most house members had also been elected from such districts until 1965. As noted earlier the balance was sharply reversed by the judicial reapportionment in that year. Subsequent legislatures, finding good the system by which they were elected, have deepened their preference for the multi-member district. Critics of the trend would suggest that preference is mixed with inability or unwillingness to come to grips with the technically demanding task of creating a large number of single-member districts of substantially equal population.

The scholarly literature is not notably helpful in its discussion of the relative merits of the two modes of representation.[126] Like the more general question of the nature of representation,

most of the arguments for one system or the other are apt to appear more polemical than persuasive, depending upon the particular representation values that inform the advocate.

Proponents of the single-member district are apt to make one or more of the following claims for that mode of representation:[127]

1. The district is relatively small in area and population; this fosters personal identification between the constituent and the single legislator from the commencement of the campaign through the term of legislative service.

2. In the smaller districts, campaign expenses would be reduced, opening candidacy to people who otherwise would be deterred by the costs and rigors of at-large candidacy in a populous urban district or a far-flung rural district.

3. The relative intimacy of relationships of each constituent to one legislator will keep the legislator more responsible to those he represents; constituents will know, or readily learn, to whom they should address their desires, and they can more readily follow and evaluate voting performance of the representative.

4. Because districts are relatively small, territorially based minorities within the larger community gain representation that would be denied them by dominant majorities of a larger constituency.

To these central claims the critics of single-member districts are apt to make these rejoinders:

1. Localization of interests in the smaller constituencies gives undue advantages to narrow and parochial interests; recognition of larger values for the entire political community tends to be diminished.

2. The base for recruitment of effective representatives is too narrow, diminishing the stature of representatives and the quality of legislation.

3. The decennial problem of redefining the more numerous boundaries of single-member districts is unduly costly and disruptive of district continuity.

4. The increased opportunities for gerrymandering of district boundaries will tend to perpetuate representation of locally dominant groups.

Proponents of multi-member districts also may make these claims for their favored mode of representation:

1. Group representation of the larger community fosters team representation and increases the community's "clout" in the legislature.

2. Party responsibility for recruitment and discipline of its members is fostered by group representation; this improves the quality of representation, while achieving economies to be had in group candidacy.

3. The larger view of things is fostered by the broader constituency; local and immediate interest-group pressures upon particular legislators are cushioned by group representation.

Proponents of single-member districts are apt to argue, in turn, that such points simply prove their claims for better representation from the smaller district.

1. They ask how a voter can make rational choices from a list of a dozen or more candidates.

2. They argue that in many situations the larger multi-member district is simply a massive gerrymander for the community-wide majority.

3. They suggest that candidates need not live in the district represented, but might be required to "stand" in a particular district--the pattern frequently practiced in British parliamentary elections.

Multi-member advocates might counter that local residence of candidates is a deeply treasured American tradition.

And so the arguments run. So much depends upon the particular context of representation, varying from state to state and from region to region within states, that values appearing to have an objective basis to their advocates are simply dismissed by critics who consider some other factor or value to have more merit or significance.

Reapportionment to one-man, one-vote standards may have encouraged an increasing use of multi-member districts for several fairly obvious reasons:

1. Reapportionment in the 1960s gave substantial increments of representation to urban centers; in Montana the four largest cities, already represented in multi-member districts of moderate size, gained seventeen more senators and nine more representatives by the reapportionment of 1965. Consequently, it was easier simply to assign additional seats to these populous centers than to devise systems for their subdivision.

2. Moreover, it is easier technically and politically to combine counties of small population, giving them multi-member representation, than to divide them up, attaching portions to other counties. Arithmetic reinforces political interests: it is easier to create a small number of large multi-member districts than to achieve a small absolute population variance among each of many smaller single-member districts.

3. It is easier technically and politically to create a fairly small set of districts for the senate, and then just double the apportionment to these districts for the house of representatives; by this device single-member representation simply disappeared from the Montana house or representatives in the 1971 reapportionment.

4. Incumbent legislators who "made it" to the legislature from sizeable multi-member districts are little disposed to examine a winner's combination very critically. This is particularly true if and when they recognize a partisan advantage in perpetuating the basis for their own partisan majorities or pluralities. The countywide pluralities of Republicans in Yellowstone County and of Democrats in Silver Bow County are fundamental, widely recognized facts of legislative politics and reapportionment in Montana.

The 1971 Montana reapportionment legislation did afford voters in multi-member districts the option to establish single-member districts by special local election, but the concession may not have been substantial, since the districtwide majorities that find advantage in large multi-member districts will be in a position to defeat the single-member district alternative in the special election.[128]

5. The relative intricacies of single-member districting sorely tax the legislature as an apportioning agency--particularly if it operates under rigorous time limitations. It seems scarcely coincidence that among the states that have developed specialized reapportioning agencies in recent years, the great majority also require single-member districts in one or both chambers of their legislature.[129]

Of course the constitution need not resolve the choice among the two styles of districting, but Montana experience suggests that when there is no specification, the multi-member district is apt to thrive and proliferate. Resolution of the choice by constitutional statement seems to be the prevailing pattern in modern constitutions; it serves as a check against the possible disposition of legislatures simply to perpetuate and deepen the system by which incumbents have gained election.

Gerrymandering

This indigenous American political term intrigues Europeans, and its best definition may be in the Oxford English Dictionary: "to manipulate in order to gain an unfair advantage." The American Political Dictionary adequately characterizes what goes on in single-member districting:

> The drawing of legislative district boundary lines with a view to obtaining partisan or factional advantage . . . . The object is to spread the support for one's party over many districts and to concentrate the support for the other party in few districts.[130]

This definition scarcely covers the equally powerful advantage derived by spreading a majority interest to multiple representatives within a district.

Statements of constitutional standards for reapportionment--compactness, contiguity and equality of population in the districts--all are efforts to limit the search for unfair political advantage. But modern experience suggests that the most effective protection against unfair political advantage may lie elsewhere--notably in the general recognition that political interests and values are inevitably at stake, however "automatic" the process may be made to appear. In a fundamental sense, "automatic" features are simply programmed protections of certain political interests, as contrasted to others.

Any boundary defined in the reapportionment process will have political consequences for people on either side of the line, whether or not those consequences are perceived or even imagined by the draftsman. The political consequences of line-drawing are not necessarily diminished, and may indeed be accentuated, by apportionment of multiple representatives among fewer districts. These points could well be axioms of the reapportioning agency and of the voting public. It is almost equally axiomatic, and perhaps more broadly recognized, that the legislator as reapportioning agent would draw the boundaries of his own district first, and let others fall where they may. This is one reason, but not the only one, why legislatures have difficulties in reapportioning themselves. The legislator's understandable predilection to protect his own interest has become particularly difficult to reconcile with the technically demanding aspects of "one-man, one-vote" reapportionment to narrow tolerances of variation among constituency populations.

Districting and apportionment lie at the heart of representation and make reapportionment a quintessentially political process,

whether its practitioners recognize the fact or not. To deny this aspect of the problem creates grave misconceptions. Nor can computers escape the basic facts. They can draw lines, but only to orders given by programmers who, in turn, are instructed by politicians; and politicians in the end select the computer product that on balance pleases them most or displeases them least.

In a state where each major party is reported to retain the services of a full-time reapportionment expert, the New York draft constitution of 1968 proposed [Art. III, Sec. 2(c)]: "Gerrymandering for any purpose is prohibited." Had that provision become basic law, there is no reason to suppose the party experts on districting and reapportionment would have had to seek new employment.

The quest of a number of modern constitutions for openly bipartisan reapportioning agencies, in which major political interests are acknowledged and required to operate over the table with a narrow balance of forces modified only by a tie-breaker to avoid deadlock, may be the best protection against unfair political advantage currently discernible on the American reapportionment scene. This turns consideration back to the importance of an appropriate agency for the task.

NOTES

1. J. Roland Pennock, ed., "Representation," Nomos X, Yearbook of the American Society for Political and Legal Philosophy (New York: Atherton, 1968), brings together ideas of nearly two dozen contemporary students of the subject.

2. Herman Finer, The Theory and Practice of Modern Government, rev. ed. (New York: Holt, 1949), note 41 at p. 231.

3. Robert Luce, Legislative Principles (Boston: Houghton Mifflin, 1930), pp. 337, 340, 342 and generally Ch. 15, "Places of Population." Cited hereafter as Luce, Legislative Principles. Alfred Z. Reed, The Territorial Basis of Government Under the State Constitutions, No. 106, Columbia University Studies in History, Economics and Public Law (New York, 1911), at p. 18 notes that territorial districts were conceived to have fixed boundaries in the colonial period. At page 137, Reed stated: "It may be said that the principle of proportionate representation of localities was just beginning to develop at this time [the American Revolution]." The middle and Southern colonies granted representation to territorial units with little regard to their populations; but the point has been made that in these colonies population was rather evenly distributed so that extreme variances of representation in relation to population may have been in the magnitude of 23 to 1 in Virginia. See Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures (Washington: U.S. Government Printing Office, 1962), p. 8.

4. Sec. 157: "[t]he people, when the legislative is once constituted, having in such a government . . . no power to act as long as the government stands, this inconvenience is thought incapable of a remedy." All quotations from Everyman's Library edition (New York: Dutton, 1924).

5. Ibid., Sec. 158.

6. Ibid.

7. Luce, Legislative Principles, pp. 343, 350. See also Robert McKay, Reapportionment: The Law and Politics of Equal Representation (New York: Twentieth Century Fund, 1965), p. 21. Cited hereafter as McKay, Law and Politics.

8. Continued "dual representation" of some voters in their place of business and in university constituencies were minor exceptions to this pattern from 1832 until 1948.

9. Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (New York: Oxford University Press, 1968), p. 94. Cited hereafter as Dixon, Democratic Representation. At pp. 91-96, Dixon briefly discusses apportionment practice in the United Kingdom and West Germany.

10. Reynolds v. Sims, 377 U.S. 533, 573, note 52 (1964) citing Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures (Washington: U.S. Government Printing Office, 1962), pp. 10-11, 35 and 69.

11. Herweg v. 39th Legislative Assembly, 246 Fed. Supp. 454 (1965).

12. McKay, Law and Politics, p. 24.

13. Ibid., pp. 26-27.

14. Ibid., p. 28. Dixon, Democratic Representation, p. 84 states: "In some states it was easier simply to stop reapportioning."

15. William J. D. Boyd, Changing Patterns of Apportionment (New York: National Municipal League, 1965), p. 25: "There were states like New York in which constitutional formulas for apportionment were so clearly rigged in favor of one section of the state and one political party that reapportionment was accomplished with some degree of regularity since it did not post a threat to the dominant party." This represents still anotner variation; both parties in Montana appear to have enjoyed local advantages from malapportionment, depending upon the interest or the region of the state; see Ellis Waldron, "Reapportionment and Political Partisanship in the 1966 Montana Legislative Election," Montana Business Quarterly (Fall, 1966): 11-28.

16. Dixon, Democratic Representation, p. 67.

17. Ibid., p. 85.

18. See Ellis Waldron, "Montana" chapter in Impact of Reapportionment on the Thirteen Western States E. Bushnell, ed. (Salt Lake: University of Utah Press, 1970); "100 Years of Reapportionment in Montana," Montana Law Review 28 (Fall, 1966); "Montana's 1966 Legislative Apportionment Amendment," Montana Business Quarterly (Winter, 1965).

19. Organic Act of 1867, 14 Stat. 426, Sec. 5: "The apportionment . . . shall be based upon . . . an enumeration of the qualified electors of the said several legislative districts . . . and from other sources of information as

will enable the governor, without taking a new census, to make an apportionment which shall fairly represent the people of the several districts in both houses . . . but the legislature may at any time change the legislative districts of the territory as fixed by the governor."

20. See Montana, Constitutional Convention of 1889, Proceedings and Debates of the Constitutional Convention (Helena: State Publishing Co., 1921), pp. 622-626; 629-636; 942-945. Little of the rhetoric of reapportionment employed in the 1960s was new; almost all of the principal arguments had been voiced in Helena in 1889. There were thirty-nine Democrats, thirty-five Republicans and one Independent in the 1889 Convention; the four western-most mining counties--Silver Bow, Lewis and Clark, Deer Lodge and Missoula--were represented by twenty Democrats, eighteen Republicans and the one Independent; the four eastern-most counties, Custer, Dawson, Yellowstone and Fergus, were represented by six Republicans and three Democrats.

21. The Montana Constitution [Art. V, Sec. 4] states "there shall be no more than one Senator from each county" and [Art. VI, Sec. 4] "each of said counties shall be entitled to one Senator, but in no case shall a Senatorial district consist of more than one county." The latter provision was deleted by amendment in 1966.

22. The Montana Constitution [Art. VI, Sec. 2] directed the legislature to conduct an enumeration of inhabitants in 1895 and every tenth year thereafter, and at the legislative sessions after this state census and after the decennial United States census, to apportion representation "on the basis of such enumeration according to ratios to be fixed by law." The state censuses and seventh-year reapportionments were never implemented, and this provision disappeared by amendment in 1966.

23. Reynolds v. Sims, 377 U.S. 533 (1964) and associated cases.

24. Herweg v. 39th Assembly, 246 Fed. Supp. 454 (1965).

25. Roberts v. Babcock, 246 Fed. Supp. 396 (1965) for the congressional districts; Herweg v. Butte (U.S.D.C. Mont., Civil No. 1232, unreported, 1965) for aldermanic reapportionment.

26. 1967 Laws of Montana, Ch. 194.

27. 1971 Laws of Montana, 1st Extra Session, Ch. 3.

28. Wold v. Anderson, Civil No. 939 (U.S.D.C. Montana, Opinion and Order, June 11, 1971).

29. Ibid. (Order, July 26, 1971).

30. Ibid. (Order and Opinion, Nov. 22, 1971).

31. The Fourteenth Amendment subsequently invalidated original provisions for enumeration of slaves at three-fifths the number of "free persons" and required representation of any state to be reduced for abridgment in federal elections of the vote of 21-year-old male citizens, except for participation in crime or rebellion. The latter provision never was implemented during the long period of state discrimination against Negro participation in elections. The Sixteenth Amendment clarified the status of the federal income tax as an indirect tax that need not be apportioned to population; in general, poll taxes and property taxes are considered to be "direct" taxes whose incidence must be apportioned to population, thereby effectively preventing their levy by the national government.

32. William J. Keefe and Morris S. Ogul, The American Legislative Process: Congress and the States (Englewood Cliffs, N.J.: Prentice-Hall, 1964), p. 71. See also Andrew Hacker, Congressional Districting (Washington: Brookings Institution, 1963).

33. Wesberry v. Sanders, 376 U.S. 1 (1964), applied to Montana congressional districts in Roberts v. Babcock, 246 Fed. Supp. 396 (1965).

34. Alfred Z. Reed, The Territorial Basis of Government Under the State Constitutions, No. 106, Columbia University Studies in History, Economics and Public Law (New York, 1911), pp. 137-234 may be the most detailed and systematic review of the bases of representation through the nineteenth century. Cited hereafter as Reed, Territorial Basis. See also Luce, Legislative Principles, Chs. 4, 5 and 15.

35. Reed, Territorial Basis, p. 155 ff. for discussion of periodicity of reapportionments, and Luce, Legislative Principles, pp. 350-355, for discussion of the evolving pattern of periodicity in legislative reapportionments. Belle Zeller, ed., American State Legislatures (New York: Crowell, 1954), p. 43 notes the situation in 1954.

36. Reed, Territorial Basis, p. 138 ff. regards the 1776 Pennsylvania arrangement for septennial reapportionment by the legislation "in proportion to the number of taxable inhabitants" [1776 Pennsylvania Const. Sec. 17] to have been the most emulated provision among early state constitutions. The first constitutions of South Carolina, Maryland and Georgia appear to have left little if any role for the legislature.

37. As noted earlier, modern British practice follows Locke's lead, placing periodic districting of Parliament in the hands of non-legislative boundary commissions.

38. Reed, Territorial Basis, p. 45.

39. Ibid., p. 240.

40. Ibid., p. 238.

41. Ibid., p. 150.

42. 1851 Ohio Const. Art. XI, Sec. 11.

43. Stewart R. Jaffy, "The Criteria of the Ohio Constitutional Convention of 1850-1851," Reapportioning Legislatures, ed. Howard D. Hamilton (Columbus: Merrill, 1966), p. 52. Cited hereafter as Jaffy, "Criteria of the Ohio Convention."

44. 1802 Ohio Const. Art. I, Secs. 2, 6.

45. State ex rel. Dudley v. Evans, 1 Ohio State 422, 423 (1853), quoted in Jaffy, "Criteria of the Ohio Convention," p. 53.

46. Jaffy, "Criteria of the Ohio Convention," p. 56.

47. Nolan v. Rhodes, 378 U.S. 556 (1964) was one of the memorandum decisions announced June 22, 1964, a week after the principal case of Reynolds v. Sims. See also Dixon, Democratic Representation, p. 83, and McKay, Law and Politics, p. 27 for the historic place of the Ohio "Hannah Amendment" along with Montana's constitutional provisions of 1889 in the early modern flight from representation based on population.

48. Belle Zeller, ed., American State Legislatures (New York: Crowell, 1954), pp. 41-42 and Ch. 3 generally for description of the status at mid-century. Cited hereafter as Zeller, American Legislatures. The Oregon Constitution simply required that the number of legislators be fixed by law, and the Tennessee Constitution simply said the legislature should be reapportioned. Delaware fixed details in its constitution. The Idaho and Nevada constitutions also fixed districts and the number of representatives but allowed their revision by statute. In New York and Oklahoma, legislative reapportionment was specifically made subject to judicial review.

49. 328 U.S. 549. There was no majority opinion. Seven justices participated. Two justices agreed with Justice Frankfurter that enforcement of congressional legislation for congressional districting was for Congress, not the courts; warning of judicial entry into "this political thicket," Frankfurter said: "Of course no court can affirmatively re-map the Illinois districts . . . . At best we could only declare the existing electoral system invalid." This was not one of the great justice's most prescient comments. Justice Black spoke for three who believed that federal courts clearly could intervene to protect the voting rights under the equal protection guarantees of the 14th Amendment, and that they should have done so in the Colegrove case. Justice Rutledge, holding the "swing vote" agreed that the courts had jurisdiction to fashion an equitable remedy in appropriate reapportionment cases, but opposed intervention in the Colegrove case because a congressional election was imminent. Thus, the court alignment was 4-3 that federal courts could intervene to compel reapportionment in appropriate cases, and 4-3 that the Colegrove action was not appropriate for such intervention. It is no particular tribute to legal research that Frankfurter's position was commonly cited as describing the holding in the case.

50. Baker v. Carr, 369 U.S. 186 (1962). Justices Frankfurter and Harlan dissented.

51. Wesberry v. Sanders, 376 U.S. 1 (1964), interpreting the obligation of states to give equitable congressional representation under Article I, Section 2 of the U.S. Constitution governing congressional elections.

52. Reynolds v. Sims, 377 U.S. 533 (1964) and associated cases, interpreting the Fourteenth Amendment guarantee that "no state . . . shall deny to any person within its jurisdiction the equal protection of the laws."

53. Dixon, Democratic Representation, pp. 300-313 summarizes the Illinois experience; Dixon observed (at p. 311) that computers "after three or four hours of programming, could produce within thirty seconds the answer to a suggestion which had already been found by hand and discarded."

54. This summary of judicial involvement was derived from state surveys in National Municipal League, Apportionment in the Nineteen Sixties (New York, 1967), revised in parts to November, 1970, unpaged, and hereafter cited as Apportionment in the 1960s, and from state summaries in Dixon, Democratic Representation, pp. 589-633.

55. Maine Const. Art. IV, Pt. 1, Sec. 3.

56. Proposed Rhode Island Constitution of 1968, Art. IV, Sec. 5.

57. Arkansas Const. Art. III, Sec. 4c; Hawaii Const. Art. III, Sec. 4; Illinois Const. Art. IV, Sec. 3; Michigan Const. Art. IV, Sec. 6. Compare Oklahoma Const. Art. V, Sec. 11D; Proposed Maryland Constitution of 1968, Art. III, Sec. 3.06; Proposed New Mexico Constitution of 1969, Art. III, Sec. 5E; Proposed Idaho Constitution of 1970, Art. III, Sec. 4.

58. The Alaska Constitution [Art. VI, Sec. 11] allows thirty days for voter action to compel performance by apportionment commission or governor; Florida Constitution [Art. III, Sec. 16] gives fifteen to sixty days to compel certain performances; Michigan [Art. IV, Sec. 6] gives sixty days to compel certain performances.

59. See Alaska Constitution [Art. VI, Sec. 11] providing thirty days for a trial court of general jurisdiction to review an apportionment; Hawaii [Art. III, Sec. 4] providing forty-five days for judicial review of a reapportionment, and Michigan [Art. IV, Sec. 6] giving sixty days for court review of an apportionment commission plan.

60. Illinois Const. Art. IV, Sec. 3; Proposed New Mexico Constitution of 1969, Art. III, Sec. 5E. Proposed Idaho Constitution of 1970, Art. III, Sec. 4 gave original state supreme court jurisdiction "whenever the [apportionment] statute materially fails to meet the [constitutional] requirements for districts," leaving unclear whether the court would initiate the action or accept a citizen suit. The language implies an affirmative finding of what such a suit would seek to establish as the basis for granting the jurisdiction to determine the question.

61. State Government News (Lexington: The Council of State Governments, Vol. 14, No. 12, December, 1971), p. 2.

62. Dixon, Democratic Representation, p. 364.

63. Florida Const. Art. III, Sec. 16. This 1968 provision was enacted after a stormy struggle over reapportionment that involved the legislature, the governor and both federal and state courts for more than a decade. See Manning Dauer, "Florida Reapportionment," Apportionment in the 1960s, and Dixon, Democratic Representation, pp. 444-445 and 596-597.

64. Oregon Const. Art. IV, Sec. 6. See Clay Meyers, "Oregon Reapportionment (1970)," Apportionment in the 1960s, and Dixon, Democratic Representation, note 46 at p. 116, citing the cases involved, and p. 620.

65. California Const. Art. IV, Sec. 6.

66. Dixon, Democratic Representation, pp. 370-378, summarizing the California experience, stressed the value for the legislators of rather precise judicial guidelines that narrowed opportunity for the almost endless "nudging" of particular district lines that plagues legislative approach to the problem. See also Alvin Sokolow, "California Reapportionment," Apportionment in the 1960s. R. Adickes, "California Reapportionment: A New Amendment," Southern California Law Review 40 (1967): 646, proposed a twelve-member mixed commission that would add eight legislators, evenly distributed among the major parties, to the ex officio members presently designated, removing the state superintendent of public instruction; an eight-vote majority would be required for commission decisions.

67. Oklahoma Const. Art. 5, Sec. 11A. Dixon, Democratic Representation, pp. 292-300, 619, summarized federal judicial intervention and court adoption of a reapportionment plan prepared by the attorney general (as defendant in a litigation) as one of the less desirable examples of judicial intervention to accomplish "instant reapportionment" without adequate regard for bipartisan political considerations; "one is left almost breathless by the casual decision-making process judically employed [p. 299]." See also George Mauer, "Oklahoma Reapportionment (1970)," Apportionment in the 1960s.

68. North Dakota Const. Art. II, Sec. 35.

69. See H. J. Tomasek, "North Dakota Reapportionment," Apportionment in the 1960s; Dixon, Democratic Representation 364 and 618. An initiated constitutional amendment in 1960 had frozen a 1931 senate apportionment into the constitution; Paulson v. Meier, 232 Fed. Supp. 183, 186 (1964) appeared to have held the entire Section 35 of Article II to be unconstitutional along with two other apportionment sections of the constitution, but no revision of the procedural provisions for the apportioning board appears to have been made as recently as 1971; the matter may have been left for redefinition by the North Dakota Constitutional Convention of 1971.

70. South Dakota Const. Art. III, Sec. 5.

71. See Alan Clem, "South Dakota Reapportionment," Apportionment in the 1960s; Dixon, Democratic Representation, 364n, 618.

72. Texas Const. Art. III, Sec. 28. See Riley Fletcher, "Texas Reapportionment, Apportionment in the 1960s; Dixon, Democratic Representation, 364n and 623-624.

73. Proposed New Mexico Constitution of 1969, Art. III, Sec. 5. See James Harvey, "Legislative Apportionment in New Mexico," Apportionment in the 1960s; Dixon, Democratic Representation, pp. 517, 614-615, noting rejection of a weighted voting plan.

74. Connecticut Const. Art. III, Sec. 6.

75. Dixon, Democratic Representation, pp. 340-343; see also Robert Franklin, "Connecticut Reapportionment," Apportionment in the 1960s.

76. Dixon, Democratic Representation, pp. 300-303; see also Samuel Gove, "Illinois Reapportionment (1970)," Apportionment in the 1960s.

77. Illinois Const. Art. IV, Sec. 3.

78. Arizona Const. Art. IV, Pt. 2, Sec. 1(1). Zeller, American Legislatures, p. 41.

79. See Paul Kelso, "Arizona Reapportionment," Apportionment in the 1960s; Dixon, Democratic Representation, p. 591; and Ely v. Klahr, ____ U.S. ____ , 29 L.Ed. 2d 352, 91 S.Ct. 1803 (1971).

80. The Alaska Constitution [Art. VI, Sec. 3] referred only to gubernatorial reapportionment of the house of representatives, senate representation having been specified in the constitution; but other sections of Article VI contemplated periodic revision of both senate and house districts and the governor in 1965, recognizing implications of the 1964 reapportionment cases, assumed responsibility to adjust senate representation. The Alaska Supreme Court eventually sustained this assumption of authority, against protest by some disadvantaged senators. The effect of the reapportionment was to deprive the constitutionally defined regions of their original rationale in senate representation. See Arthur Peterson, "Alaska Reapportionment: History and Analysis," Apportionment in the 1960s. Dixon, Democratic Representation, pp. 369-370, summarizes Alaska developments under the heading: "Big Daddy Syndrome: All Power to the Governor."

81. Arkansas Const. Art. III, Sec. 4. The 1874 Arkansas Constitution [Art. VIII, Sec. 1] was amended in 1936 to make the governor, secretary of state and attorney general an ex officio board of apportionment.

82. See Marcus Holbrook, "Arkansas (1969)," Apportionment in the 1960s; Dixon, Democratic Representation, pp. 368-369, 592.

83. Zeller, American Legislatures, p. 42, said in 1954 that the Missouri arrangement was "widely acclaimed" and that the senate reapportionment commission, combined with house reapportionment by the secretary of state according to constitutional formulas, meant "Missouri has recognized that reapportionment for both houses is a task that lies outside the legislature itself."

84. Missouri Const. Art. III, Sec. 7.

85. Dixon, Democratic Representation, pp. 331-332, credits the fact that "in nominally bipartisan Missouri the mandatory bipartisan senate apportionment commission has never deadlocked [despite lack of a tie-breaking vote]" to this executive discretion in the appointments.

86. Missouri Const. Art. III, Sec. 2.

87. Missouri Const. Art. III, Secs. 2, 7; Missouri Statutes Sec. 477.083 provides for designation of supreme court commissioners. See Dixon, Democratic Representation, pp. 331-333, 611, for suggestion of the point about deadlock; see also Robert Karsch, "Missouri Reapportionment," Apportionment in the 1960s.

88. Michigan Const. [Art. IV, Sec. 6]; no public officers or employees may serve on the commission, and commissioners may not serve in the legislature until two years after the apportionment in which they participated. Ellis Waldron, "The Legislative Assembly in a Modern Montana Constitution, Montana Law Review 40 (1972), erroneously stated that the Michigan commission elected a ninth member as chairman.

89. See Dixon, Democratic Representation, pp. 314-328, 608-609; and Eldon Sneeringer, "Michigan Reapportionment," Apportionment in the 1960s. The U.S. Supreme Court [Badgley v. Hare, 385 U.S. 114 (1966)] eventually declined review of the state supreme court's choice made In Re Apportionment of the Michigan Legislature, 377 Mich. 396, 140 N.W.2d 436 (1966).

90. Dixon, Democratic Representation, p. 328.

91. New Jersey Const. Art. IV, Sec. 3 (1), (2).

92. See Ernest Reock, "New Jersey Reapportionment," Apportionment in the 1960s; a computer employed to design districts in 1969 made no effort to achieve compactness, resulting in a wild pattern of boundary lines and "giving the impression of an extreme case of gerrymandering."

93. Dixon, Democratic Representation, pp. 336-340, 613-614; Robert Dixon and Gordon Hatheway, "The Seminal Issue in State Constitutional Revision: Reapportionment Method and Standards," William and Mary Law Review 10 (1969): 888, 890-893. Cited hereafter as Dixon and Hatheway, William and Mary Law Review 10 (1969).

94. Hawaii Const. Art. III, Sec. 4. There is to be a reapportionment in "1973 and every eighth year thereafter." See Normal Meller, "Hawaii Reapportionment (1970)," Apportionment in the 1960s; Dixon, Democratic Representation, pp. 599-600. Burns v. Richardson, 384 U.S. 73 (1966), was of particular interest for its approval, on a temporary basis and in the peculiar circumstances of Hawaii, of reapportionment based upon registered voters rather than total population. See also Dixon and Hatheway, William and Mary Law Review 10 (1969): 888, 897-899.

95. Pennsylvania Const. Art. II, Sec. 17. See Mitchell Hunt, "Pennsylvania Reapportionment (1969)," Apportionment in the 1960s, and Dixon, Democratic Representation, pp. 382, 620, for developments preceding adoption of the new commission plan; Dixon and Hatheway, William and Mary Law Review 10 (1969); 888, 895-896.

96. Proposed New York Constitution of 1967, Art. III, Sec. 2. The draft article defined some standards to be observed by the commission, including a provision that "Gerrymandering for any purpose is prohibited." The latter provision almost predictably would precipitate troublesome litigation, because any districting line has political consequences that establish political advantage for one group and disadvantage for another. This provision would have invited the New York courts to develop standards for measurement of gerrymandering, a problem thus far largely evaded by the courts in their reapportionment involvements. The suggestion by Dixon [Democratic Representation, p. 339] that judicial challenge to apportionment plans be required to show "invidious political or racial effect" seems a more workable approach to this problem.

97. See William Boyd, "New York Reapportionment," Apportionment in the 1960s; Dixon, Democratic Representation, pp. 360-361, 615-617; Dixon and Hatheway, William and Mary Law Review 10 (1969): 888, 896-897. Boyd told Montana's legislative reapportionment committees in February, 1971, that both major political parties in New York retained full-time reapportionment experts.

98. Proposed Maryland Constitution of 1968, Art. III, Secs. 3.05 and 3.06; 3.07 provided substantially the same process for congressional districting.

99. Dixon, Democratic Representation, p. 382; Dixon and Hatheway, William and Mary Law Review 10 (1969): 888, 893-895; see also Franklin Burdette, "Maryland Reapportionment," Apportionment in the 1960s.

100. Maryland Const. Art. III, Sec. 5, as amended, November, 1970.

101. Zeller, American Legislatures, pp. 41-44.

102. Alaska, Arkansas, Arizona, Hawaii, Michigan, Missouri, New Jersey, Ohio, Pennsylvania and draft constitutions of New York (1967) and Maryland (1968).

103. California, Connecticut, Illinois, Maryland, North Dakota, Oklahoma, Oregon, South Dakota, Texas and New Mexico (1969 draft)

104. Alaska, Arkansas, Hawaii, Michigan, Pennsylvania, Maryland (1968 draft) and New York (1967 draft).

105. Connecticut, Illinois, New Mexico (1969 draft).

106. Arizona's arrangement that the secretary of state apportion can be regarded as a simplified version of the Ohio plan, and Alaska's provision for gubernatorial reapportionment also most closely resembles this group of agencies; compare the 1970 Maryland provision for gubernatorial reapportionment.

107. When Delegate Toole of Lewis and Clarke objected just before the final vote in Montana's 1889 Convention that provisions for senate representation were "a transfer of political power in the Senate from a majority to a minority" promising "taxation without representation in its most flagrant form," Delegate Goddard of Yellowstone moved the statement be printed and "circulated as campaign literature." (1889 Proceedings, p. 944).

108. Fixed size: Alaska [Art. II, Sec. 1: senate 20, house 40]; Arkansas [Art. III, Sec. 1: senate 34, house 102]; Hawaii [Art. III, Secs. 2,3: senate 25, house 51]; Illinois [Art. IV, Sec. 1: senate 59, house 177]; Michigan [Art. IV, Secs. 2, 3: senate 38, house 110]; New York 1967 draft constitution [Art. III, Sec. 1a: senate 60, house 150]; Rhode Island 1968 draft constitution [Art. IV, Secs. 3, 4: senate 40, house 100].

Range of Size: Connecticut [Art. III, Secs. 3, 4: senate 30-50, house 125-225]; Florida [Art. III, Secs. 1, 16: senate 30-40, house 80-100]; Virginia [Art. IV, Secs. 2, 3: senate 33-40, house 90-100].

Maximum size: Maryland 1968 draft constitution, [Art. III, Sec. 3: senate 40, house 120]; New Mexico 1969 draft constitution [Art. III, Sec. 2: senate 42, house 70].

109. Example: a difference of 100 actual population between two districts represents a variance of only 1 percent among districts with average population of 10,000, but a variance of 2 percent if the district norm is 5,000. The variances of as much as 10 percent in Montana's 1971 reapportionment may prove comparatively large. Among twenty-nine states

whose 1971 reapportionments were summarized in State Government News [(Lexington: The Council of State Governments, Vol. 14, No. 12, December, 1971), p. 2], seven had kept districts within less than 1 percent of variance.

110. See Ellis Waldron, "The Legislative Assembly in a Modern Montana Constitution," Montana Law Review 33 (1972) 1, 7 for these and other figures derived from data in 1970-71 Book of the States (Lexington: The Council of State Governments, 1970), pp. 65, 82-83.

111. Burns v. Richardson, 834 U.S. 73, 85 (1966) is cited as authority for this perhaps most restrictive base. A word of caution may be in order that the reapportionment approved in Burns was an interim plan allowed when legislative elections were imminent.

112. WMCA v. Lomenzo, 238 Fed. Supp. 916 (S.D.N.Y. 1965) affirmed 382 U.S. 4 (1965); and Baker v. Carr, 247 Fed. Supp. 629 (N.D. Tenn. 1965).

113. Dixon and Hatheway, William and Mary Law Review 10 (1969): 888-901.

114. 394 U.S. 526, 529 (1969).

115. Wold v. Anderson, noted above.

116. Dixon and Hatheway, William and Mary Law Review 10 (1969): 888, 902.

117. By comparison with former language, this section (proposed in 1965 Laws of Montana, Ch. 273) deleted obsolete and unconstitutional requirements of one and only one senator per county, permitted combination of counties in creating legislative districts, deleted the earlier prohibition against division of counties in districting (thereby permitting single-member districts) and anticipated a time when federal constitutional requirements might permit return to the one-senator-per-county style of representation. See Ellis Waldron, "Montana's 1966 Legislative Apportionment Amendment," Montana Business Quarterly 4 (Spring, 1966): 11-12.

118. Compact and contiguous: Alaska [Art. VI, Sec. 6]; Arkansas [Art. III, Sec. 3]; Hawaii, [Art. III, Sec. 4]; Illinois [Art. IV, Sec. 3]; Michigan [Art. IV, Sec. 3]; Pennsylvania [Art. II, Sec. 16]; Virginia [Art. II, Sec. 6]; Idaho 1970 draft constitution [Art. III, Sec. 4]; New Mexico 1969 draft constitution [Art. III, Sec. 5c]; New York 1967 draft constitution [Art. III, Sec. 2].

Compact: Maryland 1968 draft constitution [Art. III, Sec. 3.04]; Rhode Island 1968 draft constitution [Art. IV, Sec. 5].

Contiguous: Connecticut [Art. III, Sec. 3]; Florida [Art. III, Sec. 16].

119. Maryland 1968 draft constitution [Art. III, Sec. 3.04]: "due regard to natural boundaries and boundaries of political subdivisions." New York 1967 draft constitution [Art. III, Sec. 2(c)]: "wherever practicable, preexisting political subdivisions boundaries and natural geographic boundaries shall be used as district boundaries." Rhode Island 1968 draft constitution [Art. IV, Sec. 5]: "Districts shall, as far as feasible, follow town and city lines."

120. 1971 Laws of Montana, 2nd Extra Session, Ch. 8.

121. Luce, Legislative Principles, p. 380.

122. Compare Zeller, American Legislatures, p. 63 with Maurice Klain, "A New Look at the Constituencies: The Need for a Recount and a Reappraisal," American Political Science Review 49 (1955): 1105, 1111.

123. Ibid., pp. 1107, 1108.

124. William Keefe and Morris Ogul, The American Legislative Process: Congress and the States (Englewood Cliffs: Prentice Hall, 1964), p. 72, citing Paul David and Ralph Eisenberg, State Legislative Districting (Chicago: Public Administration Service, 1962), p. 20. Cited hereafter as Keefe and Ogul, Legislative Process.

125. See Waldron, "Legislative Assembly," p. 21 for computations derived from 1970-1971 Book of the States (Lexington: The Council of State Governments, 1970), pp. 82-83, and comment on discussion of the matter in John Burns, The Sometime Governments (New York: Bantam Books, 1971), p. 82.

126. See Malcolm Jewell, The State Legislature (New York: Random House, 1969), pp. 20-24; Malcolm Jewell and Samuel Patterson, The Legislative Process in the United States (New York: Random House, 1966), Ch. 3; Keefe and Ogul, Legislative Process, Ch. 3; Robert Dixon, "Representative Values and Reapportionment Practice: The Eschatology of 'One-Man, One-Vote,'" Nomos X, Yearbook of the American Society for Political and Legal Philosophy (New York: Atherton, 1968), pp. 167-195; Alfred DeGrazia, Apportionment and Representative Government (New York: Praeger, 1962); Dixon, Democratic Representation; Ruth Silva, "Compared Values of the Single-and Multi-Member Legislative District," Western Political Quarterly 17 (1964): 17; David Leuthold, "The Effect of Multi-Member Districts on State Legislatures" (processed, distributed in the 1965 Montana Legislature), Luce, Legislative Principles, Ch. 17;

John Banzhaf III, "Multimember Electoral Districts--Do They Violate the 'One Man, One Vote' Principle," Yale Law Journal 75 (1966): 1309.

127. The following discussion is derived directly from Waldron, "Legislative Assembly," pp. 23-24; there the author expressed a personal preference for single-member districts or the limitation of multi-member districts to not more than three members in the senate of a bicameral legislature.

128. 1971 Laws of Montana, 2nd Extra Session, Ch. 8, Sec. 3 provides that 8 percent of the registered voters within a multi-member district may petition for a special election; if a majority voting on the issue in that election favors single-member districting the county commissioners by majority vote shall divide the district into single-member constituencies "as compact as possible, compris[ing] contiguous territory . . . as nearly equal as practicable in population [with] boundaries [that] follow the census enumeration division lines." It may be noted further of this legislation that the same districtwide majority favored by multi-member districting may tend to control a majority of the county commissioners entrusted with districting; the formulas "compact as possible" and "equal as practicable" may invite unsettling litigation, and the reference to "census enumeration division lines" does not coincide with the terminology employed in the United States census: does it refer to the basic "census enumeration districts" or to their aggregations into "census county divisions"?

129. Single-member, both chambers: California [Art. IV, Sec. 6]; Connecticut [Art. III, Secs. 3, 4]; Michigan [Art. IV, Secs. 2, 3]; Missouri [Art. III, Sec. 9]; Pennsylvania [Art. II, Sec. 16]; Maryland 1968 draft constitution [Art. III, Sec. 3.03]; New York 1967 draft constitution [Art. III, Sec. 1].

Single-member, one chamber: Illinois [Art. IV, Sec. 2]: single-member districts for the senate, three representatives elected from each senate district.

Multi-member, both chambers: Hawaii [Art. III, Sec. 4 and Art. XVI]; Alaska [Art. XIV].

130. Jack Plano and Milton Greenberg, The American Political Dictionary, 2nd ed. (New York: Holt Rinehart Winston, 1967), p. 139.